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CONTRACTS OF ADHESION IN LIGHT OF THE BARGAIN HYPOTHESIS: AN INTRODUCTION

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I. INTRODUCTORY

THE ARCHETYPAL CONTRACT in American law is the "bargain" transaction, a relationship among two or more parties who agree to exchange acts or promises. That which either participant gives or promises to give in the future is the consideration normally prerequisite to enforcement of the promise he has received.¹ With the exception of a very few types of obligations not requiring consideration to be binding, this "bargain" is the *sine qua non*² of an enforceable contract; conversely, once such a bargain has been found, the imposition of legal sanctions normally follows.

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¹ RESTATEMENT OF CONTRACTS §75(1) (1932), is illustrative:

- (1) Consideration for a promise is
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification or destruction of a legal relation, or
 - (d) a return promise, *bargained for* and given in exchange for the promise.
- (Emphasis added).

See RESTATEMENT (SECOND) OF CONTRACTS §75 (1) (Tent. Draft No. 2, 1964): "To constitute consideration, a performance or a return promise must be *bargained for*." (Emphasis added). See also the UNIFORM COMMERCIAL CODE, 1962 Official Text [Hereinafter cited as U.C.C.] §1-201 (11): "Contract means the total legal obligation which results from the parties' agreement . . .;" and 1-201 (3): "'Agreement' means the *bargain* of the parties in fact as found in their language or by implication from other circumstances . . ." (Emphasis supplied). UNIFORM CONSUMER CREDIT CODE §1.301(2) is nearly identical, "... the *bargain* of the parties . . ."

² In addition to the remedial devices such as quasi-contract, there are eight traditional exceptions: Promise to pay a debt barred by the Statute of Limitations, or discharged in bankruptcy; promise to perform a duty in spite of non-performance of a condition, or a voidable duty; promises inducing reliance and action (promissory estoppel); stipulations with regard to court proceedings; promises of gift made under seal; executed promises. Cf. RESTATEMENT OF CONTRACTS §§86-94 (1932). These cases not requiring a consideration also do not, generally, require manifestation of mutual assent. RESTATEMENT (SECOND) OF CONTRACTS §4, Comment c. (Tent. Draft No. 1, 1964). Similarly, U.C.C. §2-209(1), for agreements modifying a contract within Article 2.

By commonly accepted definition, the nature of the required bargain is quite narrow: "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promises and is given by the promisee in exchange for that promise."³ Such a definition does not in itself necessarily imply the qualities of actual negotiation or compromise. The exchange alone is sufficient as a jural act. But because the law of contracts is also a consensually based system, justifying the use of the legal apparatus to compel fulfillment of the exchanged promises does require that this bargain must also have a wider meaning. Namely, it must be the process by which the parties' respective detriments and benefits are adjusted to a mutually agreeable level. While a bargain is legally operative even if it fails to meet this expanded notion, throughout the law of contracts the assumption is made that by merely requiring the existence of the exchange nexus, the "adjustment" will per force occur. This hypothesis is so readily assumed that it is often considered to be fault on the part of one party or the other if the process of real mutual agreement does not in fact take place.

As accurate as this hypothesis may once have been, the bargain model (except in a highly formulaic sense) no longer describes the greatest bulk of transactions presently treated as "contracts" by the legislature and judiciary. Once the Standard Form Contract is recognized as being the most frequent memorialization of consumer level transactions, rather than as a deviant from some hypothetical norm, it is entirely relevant to ask two preliminary questions: First, should the contracting procedure be a sufficient "bargain" when a Standard Form is offered in an adhesive situation? And if not, is it different enough to call into question the logic of all that follows from postulating the bargain model?

The use of standard form contracts in the often imperfectly competitive market of consumer goods and services often violates the wider consensual definition of a bargain. To the extent that either party does not comprehend the nature of the sacrifice he has made or of the benefit he receives, he cannot be said to have agreed to the level of the exchange. By failing to recognize the standard form situation as both different from the bargain model and as statistically more common, the law's attempt to deal with the former by the application of rules derived from assuming the latter is unresponsive to reality. The prime difficulty thus generated is the unreality of assent to contract.

Those features of the standard form which most generously contribute to this unreality are two: (a) the form is a written document and (b) its use is often coincident with quasi-monopolistic situations. As a consequence

³ RESTATEMENT OF CONTRACTS §4 (1932). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §4 (Tent. Draft No. 1, 1964): "A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."

of its postulation of the "bargain," the law's responses to these two phenomena has not only been unrealistic, but also often inconsistent with the political assumptions upon which the notion of Contract rests.

In short, if Contract is viewed as a system of dealing with consensual obligations, then the premise of a bargain is both necessary and desirable. The difficulty is that under the current state of the law, operative facts sufficient to establish the existence of the requisite "bargain" often fall far short of guaranteeing the existence of real assent to the exchange. It is in this gap that the adhesive form contract, because it often removes the knowledge and choice essential to real assent, thrives best.

It is the purpose of the present essay to explore the theories outlined in this introduction, and to comment critically on the techniques currently employed to deal with the problems of standard form adhesion contracts. Finally, a suggested direction for further research will be offered.

II. THE NATURE OF CONSENT

The law has evolved for the written document a limited set of traditional techniques of inquiring into the reality of contractual assent; the categories into which they fall are Manifest Assent, Fraud, Mistake, Capacity, and Undue Influence.⁴ The operation of each of these theoretically serves to resolve for a given case the tension between the seemingly polar views that (a) a *consensus ad idem* is a necessary element of contract formation,⁵ yet (b) by the adoption of a written form assent-in-fact becomes immaterial.⁶ The present task is therefore to assess each category in turn, to determine towards which pole it gravitates, and whether its point of rest on the continuum is a sound one.

A. Contract Formation

The history of Contract is the history of economy, for it is the institution of contract which serves as the vehicle for implementing the processes of economic decision and commercial exchange. The earliest societies knew primarily the executed bargain, wherein the agreed-upon performances were immediately tendered, and the nexus thereby simultaneously extinguished. It is thus not surprising that there was no law of

⁴ A similar grouping, and the relationships among the elements, is in Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176, 177 (1943): "Each is a shorthand expression for a group of operative facts which may serve as the basis for avoiding a jural act."

⁵ *Minsky's Follies of Florida v. Sennes*, 206 F. 2d 1, 3 (5th Cir. 1953): "In order that there be a contract, the parties must have a definite and distinct understanding, common to both, and without doubt or difference. Unless all understand alike there can be no assent, and therefore no contract."

⁶ *Steinbruck v. Gazzara*, 28 Misc. 2d 254, 256, 213 N.Y.S. 2d 2, 4 (Sup. Ct. 1961): "The signer of an instrument expressive of a jural act is 'conclusively bound thereby. That his mind never gave assent to the terms expressed is not material'..."

contract as we know it at all in (pre-Norman) Anglo-Saxon society, where "... business had hardly got beyond delivery against ready money between parties both present, and there was not much room for such confidence as that on which, for example, the existence of modern banking rests."⁷ Beginning with the division of labor and continuing throughout the expansion of industrialism, the commercial world transformed its exchanges from the bucolic trade of horse for gold into the future tense of credit. Ready at hand to evolve itself into the service of regulating the promises upon which modern economies must rely was the English common law—a tool infinitely flexible in theory, but very sadly burdened by the formality of the writ system whence it came.⁸

It was the movement "from status to Contract" that effected social manumission in post-feudal England and post-bellum America, but quite ironically so; the exigencies of modern commerce have, also through the use of Contract, reversed the development of individualism, at least in economic arenas. We have now nearly come full circle; as we shall see, the evolution from formality to economic liberty has stopped short of full self-determination. Whether cause or symptom, or both, the standard form contract has participated vigorously in this process.⁹

Given that Contract reflects and furthers political notions of social responsibility,¹⁰ it may be that any radical departure in its legal structure will yield corresponding changes in the underlying political order. If this is true, the task becomes that much more necessary, for the sterile institutionalization of human affairs is one phenomenon which contract in a free enterprise society should seek to destroy. Once assent-in-fact is

⁷ Pollock, *English Law Before the Norman Conquest*, 14 L.Q. REV. 291, 304 (1898). See also 2 F. POLLOCK and F. MAITLAND, *HISTORY OF ENGLISH LAW* 182 (1st ed. 1895): "Anglo-Saxon society (i.e. before the Norman Conquest) barely knew what credit was, and (therefore) had no occasion for much regulation of contract."

⁸ Parry, *The Changing Conception of Contracts in English Law*, 4 HEBREW UNIVERSITY OF JERUSALEM—LIONEL COHEN LECTURES 3 (1958).

⁹ Cf. Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481, 481 (1962):

In the advanced industrial society, the economic apparatus is no longer focused on the particular tastes and the particular desires of individuals, but is based on mass production and mass distribution.... This... has by necessity become more and more standardized; and this standardization has its counterpart in standardized forms for dealing with the customers. Thus, still using the word contract, the word has become hyphenated. It is tied up with more significant terms. One speaks of the standardized mass contract or—and this term might even be more preferable—of standardized forms of business transactions or standard contracts or... "contracts of adhesion"... not formulated as a result of the give and take of bargaining.

Significantly, Lenhoff calls this "the absence of co-determination." *Id.* at 482.

¹⁰ E. JENKS, *LAW AND POLITICS IN THE MIDDLE AGES*, Ch. VII, "Caste and Contract" (1913). FRIEDMANN, *LAW IN A CHANGING SOCIETY* 114 (1964).

submerged through the ubiquity of the standard form, free self-determination is similarly impaired, and a new Age of Status is born.¹¹

The first appearance of a theory of private obligation akin to present contract law has often been attributed to the case of a sale of goods by some accident remaining incomplete.¹² Yet even in the most primitive stage, one finds at the root of the obligation a voluntary undertaking by the "contractor." At this early point, form and ceremony are the operative acts giving rise to the obligation, but the most inescapable oath was initially voluntarily undertaken. Legal historians seem not to have placed sufficient emphasis on this latter notion. Maine, for example, in discussing the Roman law of "contract," sees the mental engagement as becoming important only as the formality is stripped away, the latter to be retained as evidence of an assent rather than as the determinative conduct itself.¹³ What he elides is that executing the form had always been a consensual act,¹⁴ even in the early Rome which he had studied.¹⁵ The same is true of the English development, except that there, the massive dogmatism of the writ system required the creation of a new form of action to enable the nascent yet omnipresent element of real assent to come forth. This

¹¹ The coincidence of politics and contractual assent has been recognized often; e.g., Parry, *The Changing Conception of Contracts in English Law*, 4 HEBREW UNIVERSITY OF JERUSALEM—LIONEL COHEN LECTURES 3, 5 (1958):

Throughout the controversy the bone of contention during the 19th Century was the reality of the *consensus*; the essential requirement of consent or agreement in a legally binding contract was not in issue. This conception of the nature of a contract accorded well with the philosophical, economic, and political theories so widely accepted in England during the 19th Century. (Emphasis added).

¹² O. W. HOLMES, *THE COMMON LAW*, 251 (1881). This was true not only in Roman law, but with the Germans even after the Carolingian period: 2 F. POLLOCK and F. MAITLAND, *HISTORY OF ENGLISH LAW* 183 (1st ed. 1895); and also with the Hebrews at least as late as the Mishnaic-Talmudic period, for whom contract was the same as debt, an obligation arising only from executed consideration. 2 HERZOG, *THE MAIN INSTITUTIONS OF JEWISH LAW* (1939).

¹³ H. MAINE, *ANCIENT LAW* 303-325 (10th ed. 1884). Cf. 3 R. POUND, *JURISPRUDENCE* 191 (1959).

¹⁴ At least as early as the second millennium B.C.E., the Hittite suzerainty treaties were "contracts" in the sense of being the voluntary execution of operative ceremonies. These served as the model for the Old Testament "covenant" between the Hebrews and their God: "... the whole of the assembled people entered into a solemn League and Covenant. A formal contract was drawn up, binding *all who subscribed* ..." ROTH, *HISTORY OF THE JEWS* 65 (1961). (Emphasis added). Central, in fact, to the Jewish law of contract are the twin elements of consent and knowledge (Da'ath), meaning free will—these are derived, interestingly enough, from the root *YODA'*—"to know, to be aware." 2 HERZOG, *THE MAIN INSTITUTIONS OF JEWISH LAW* 107 (1939).

¹⁵ I & II B. COHEN, *JEWISH AND ROMAN LAW* (1966), contain two representative quotations from Ulpian, a Roman jurist of the second century A.D.: "... the law of contracts depends upon *agreement* (D. 16, 3, 1, 16)," *Id.* II B. COHEN, 430-431 n. 106: "What is so suitable to the good faith of mankind as to observe those things which parties have *agreed upon*?" (Digest II 14, 1 pr.) *Id.* I B. COHEN, 78. (Emphasis added),

process, culminating in our present jurisprudence, was the rise of trespass on the case, *assumpsit*. In this writ, it was clear that liability was based on an undertaking—a promise raising a duty to perform an act.¹⁶ And though its nature was at first essentially tortious,¹⁷ its consensual element is indicative of the proposition that in the sphere of private obligation a real assent had always in some manner been required. The great majority of legal encrustations are commentary to protect this central notion.¹⁸

Modern opinion has, by way of analogy, confused commentary with text. Rather than define agreement as *consensus ad idem*, and then go on to its other concerns by way of limitation, American law has included its policy judgments in the definition. An "agreement" now is operative conduct which, because it is presumed to be indicative of a known intent, is deemed to be manifested assent.¹⁹ In fact, the party so assenting may not even be "conscious of the legal relations which [his] words or acts give rise to!"²⁰

The justification proposed for this confusion is that while actual mental assent may be the ideal basis of contract, overt acts are, quite simply, more provable:²¹

¹⁶ O. W. HOLMES, *THE COMMON LAW*, Lecture VII (1881).

¹⁷ "If the jury are satisfied that the defendant undertook (*emprist sur lui*, *assumpsit*) that he failed to perform, and that the plaintiff suffered damage, there will be no inquiry into forms." E. JENKS, *LAW AND POLITICS IN THE MIDDLE AGES* 283 (2nd ed. 1913). Cf. HOBBS, *LEVIATHAN* 71 (1940 ed.): "The matter, or subject of a Covenant, is always something that falleth under deliberation; (For to Covenant, is an act of the Will; that is to say an act, and the last act, of deliberation;) . . ." For Hobbes, "(covenant) . . . is obligation of man by man, and such obligation can arise only out of man's voluntary act in covenanting." HOOD, *THE DIVINE POLITICS OF HOBBS* 115 (1964).

¹⁸ It is notable that with near unanimity, the early treatise authors began their tomes with a simple sentence such as the following: "Agreement . . . is the union of two or more persons in a common expression of will. . . ." 1 W. F. ELLIOT, *CONTRACTS* §4 (1913); "Such a voluntary agreement is a contract." COLEBROOK, *OBLIGATIONS* 2 (1818); "Voluntary assent of both contracting parties. . . ." COMYN, *CONTRACTS* 17-18 (1826); "A true assent implies the serious and perfectly free use of power, both physical and moral, to give assentment." COLEBROOK, *supra* at 45; cf. at 43: "It is of the essence of every contract or agreement, that the parties to be bound by it, should consent to what is stipulated and promised; for otherwise, no obligation can be contracted, nor concomitant right created."

"(Promissory) obligation is not forced upon men, but is made to depend upon their free consent." J. P. BISHOP, *LAW OF CONTRACTS* 12 (1887). The balance of each of the several works is, indeed, commentary on this primal axiom. Cf. M. FERSON, *THE RATIONAL BASIS OF CONTRACT* 176 (1949). Note also the concurring opinion of Mr. Justice Washington in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 463, 500-501 (in dicta. 1819). (Emphasis added).

¹⁹ RESTATEMENT OF CONTRACTS §3, Comment *a* at 6 (1932): "The word (agreement) contains no implication of mental agreement." (Emphasis added). Cf. *Id.* §230 Comment *b*. RESTATEMENT (SECOND) OF CONTRACTS §3 Comment at 20-1 (Tent. Draft No. 1, 1964), is to the same effect.

²⁰ RESTATEMENT OF CONTRACTS §20, Comment *a* at 25 (1932). Cf. *Id.* §§52, 226 Comment *b* at 305, and §71.

²¹ Parry, *The Changing Conception of Contracts in English Law*, *supra* note 8, at 4.

But since the intention or union of wills (*aggregatio mentium*) can be known or ascertained only by such outward expression, by means of words or conduct, the law imputes to each of the parties a state of mind or intention corresponding to the natural and reasonable meaning of his words and conduct, no matter what may have been his real state of mind or secret intent.²²

To use the writing to which "manifest assent" has been given as evidence of that assent is, of course, nothing new. Written documents were so employed in actions of both covenant²³ and of debt, at least as early as the reign of Henry II.²⁴ Admittedly, it is still a reasonable theory in the case of a negotiated bargain contract, but not for an adhesive standard form transaction. Where for the true bargain the adoption of the writing is usually consistent with and indicative of actual intent, this is *not* the case when the writing, rather than memorializing an agreed-to-level of exchange, is signed without comprehension or without substantially free choice. In short, the act of signing is not necessarily indicative of assent to anything other than the broadest form of the transaction. The words of one 19th Century author seem prophetic in retrospect:

It is surely logical, then, to conclude that an adequate theory of contract must regard a true agreement as the fact on which the contract rests; and explain the cases in which the contract holds good notwithstanding a mental reservation on the part of one of the contractors, by reference to the law of evidence, or to a separate doctrine which introduces practical safeguards against fraudulent dealing.²⁵

What is in issue is the central dispute between the subjective and objective theories of contract. The former, which seeks to propose legal relations created from voluntary "willing" as the realization of the ideal of economic liberty,²⁶ has fallen substantially out of favor. The case for the objective view was perhaps not grossly overstated by District Judge Hand in 1911:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning

²² 1 W. F. ELLIOT, *supra* note 18, at 5.

²³ 2. F. POLLOCK and F. MAITLAND, *HISTORY OF ENGLISH LAW* 218 (1st ed. 1895).

²⁴ O. W. HOLMES, *supra* note 16, at 259f.

²⁵ WATT, *THEORY OF CONTRACT IN ITS SOCIAL LIGHT* 22 (1897).

²⁶ See 5 R. POUND, *JURISPRUDENCE* 174 (1959).

which the law imposes on them, he would still be held, unless there were some mutual mistake, or something else of the sort.²⁷

While according to Pound:

No metaphysical theory has prevailed to prevent the steady march of the law and of juristic thought in the direction of an objective doctrine of legal transactions. Nowhere, indeed, has the deductive method broken down so completely as in the attempt to deduce principles upon which contracts are to be enforced.²⁸

The objective theory's thrust is that "... the law of contracts (should) attempt the realization of reasonable expectations that have been induced by the making of a promise."²⁹ In a commercial age, not only is wealth made up largely of promises,³⁰ or the claims to promised advantage, but the fact of a highly specialized division of labor in a free enterprise system, itself, depends on the guarantee of the law that promissory expectations will be protected.³¹ "The sanctions of contract enable the (contractor) ... to engage in calculated economic risks."³²

Again using the bargain model, the expectation of each party is defined by the level of exchange to which he has agreed. It follows, then, that enforcement at that level, as adopted in a writing perhaps, preserves the expectations developed by the bargain. Yet it should now be obvious that in a non-bargain transaction, *i.e.*, one in which one party may not have understood the level of adjustment the writing represented, his

²⁷ *Hochkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911). To the same effect is A. CORBIN, *CONTRACTS* §9 at 14-15 (One Volume Ed. 1952):

Agreement consists of mutual expressions; it does not consist of harmonious states of mind.... (W)hat we observe for judicial purposes is the conduct of the parties.... This is what is meant by mutual assent.... [O]ne may be "bound" by a contract in ways that he did not intend, foresee, or understand. The juristic effect (the resulting legal relations) of a man's expressions in word or act may be very different from what he supposed it would be.

In cases involving the sale of goods, the law may at first seem less harsh: U.C.C. §§1-201(3), 2-204(1). Yet it ultimately adopts the same position, both by its own terms, §2-202, and by reference to pre-existing private law principles: §§1-201(3), 1-103, 1-201(11).

²⁸ 3 R. POUND, *supra* note 13, at 173.

²⁹ A. CORBIN, *supra* note 27, at 2. This article of faith also provides the setting for enforcement through damages. See generally C. MCCORMICK, *LAW OF DAMAGES* 561ff (1935). These reasonable expectations, it can be argued, are more assumed than real in the mass-type transaction.

³⁰ 3 R. POUND, *supra* note 13, at 163-4.

³¹ 5 R. POUND, *supra* note 26, at 199-200; FRIEDMANN, *LAW IN A CHANGING SOCIETY* 90 (1964). Cf. WATT, *THEORY OF CONTRACT IN ITS SOCIAL LIGHT* 5 (1897): "Contract... represents a series of restraints on the egoistic caprice of man for the protection of bargains upon which the economics of division of labor must rely."

³² FRIEDMANN, *supra* note 31, at 90.

expectation is not preserved by literal enforcement.³³ In such a case there is a "loss"—a loss of promised advantage, of certainty in risk calculation—often in real money terms. Rather than recognize the source of this loss in the defective contracting process, the bargain model shifts the loss to the party who was at "fault," *i.e.*, the one who failed to protect his own interests in an acceptable way. When inequality of bargaining ability exists, "fault" is a patently poor criterion for risk-shifting, unless its definition appreciates the fallacy of the bargain hypothesis. This, it will be seen, it fails to do.³⁴

The defect in question is, again, the unreality of consent to be bound. It is elementary that an obligation to do, or to forbear from doing, an act may be imposed upon an individual only by command of a legitimate government having jurisdiction over him, or by that government's enforcement of his voluntary undertaking of the obligation in such manner as the state *must* enforce for the protection of the greater interests of the group. The former circumstance is exemplified by the law of crimes and tort; the latter, by that of contract. *Voluntary* assumption of the duty is the difference between them.³⁵ A contract is therefore ideally a set of legal relations imposed upon a party through his voluntary assumption of an obligation. One other characteristic of these relations is that they are "polarized";³⁶ the duty is not one owed to all persons collectively, but to an entity normally determinable by the obligor.³⁷ When "polarized" obligations are imposed despite a lack of intention to assume them, the notion of contract is distorted; contract may become, rather, a tool for

³³ One of the judicial responses has been to rule that certain of the proffesor's expectations were not "reasonable," hence unenforceable. The standards, however, are not sufficiently developed to be of significant aid. When a document informs one not versed in either the law or mercantile custom that his "equity of redemption" is thus and so, or that no "warranty of merchantability" arises, nor a "bailment," but that some one may be "subrogated" to another's rights, or that "confession of judgment" or the like is possible, then is his expectation of fair dealing not more "reasonable," given his lack of understanding of such terms?

³⁴ *Infra*, pp. 15f.

³⁵ While it is true that the obligation of contract is a function of law acting on individuals, and not a result of human behavior *proprio vigore*, the origin of contract obligation is in the parties' will, and not in the self-generating law. See for example: *K. C. Working Chem. Co. v. Eureka-Security F. & M. Ins. Co.*, 82 Cal. App. 2d 120, 130, 185 P. 2d 832, 840 (1947): "A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free (and) mutual...." Cf. *Parkinson v. Caldwell*, 126 Cal. App. 548, 552, 272 P. 2d 934, 937 (1954): "A contract right has its origin in the agreement of the parties...."; *Moore v. Smotkin*, 79 Ariz. 77, 80, 283 P. 2d 1029, 1030-1031 (1955); *Hollingsworth v. Federal Mining & Smelting Co.*, 74 F. Supp. 1009, 1018 (N.D. Idaho. 1947). There are exceptions, or more precisely, categories which overlap the two basic sets. Quasi-contract, for example, and certain types of constructive trusts. These, however, are remedial categories for which assent is irrelevant.

³⁶ Cf. 2 J. AUSTIN, JURISPRUDENCE 37 (1863).

³⁷ Reward cases, although an exception to this definition, are not analytically troublesome, for once made, the obligation is polarized.

the depersonalization of economic affairs. Yet the law of contracts as applied to standardized documents effects precisely this result.

A similar paradox occurs because of the "adhesive" element of the standard form transaction, where the adherent's intention may not be that of assuming the obligation, but of avoiding the consequences of the alternative.³⁸ The source of this factor is the very method of a free economy, which relies for the most part on a real theory of bargain. Each producing unit in the divided-labor economy uses the threat of the law's protection of his property (*i.e.*, withholding his production) to obtain the return he needs to be a consumer of the produce of others.³⁹ Thus, all contracts are made to avert some kind of threat. When the threat is one of an injury not adequately remediable, it becomes duress.⁴⁰ But short of that point, the bargain model sanctions the threat as a part of the contracting process. The rationality of this distinction begins to break down in the quasi-monopolistic market of consumer goods and services, wherein "adhesion" approaches duress as the need for the product and the inequality of bargaining power increase. And as these increase, reality of assent will typically decrease, approaching duress as a limit.⁴¹ So long as the existence of a bargain is analytically presumed, this feature risks being ignored. Thus the law tends to see⁴² bargaining pressure and duress as distinct items, rather than as nearly contiguous points on a spectrum.⁴³

The most thoughtful analysis to date is that of Karl Llewellyn, whose conclusion is that such transactions may result in *two* several contracts:

The answer, I suggest, is this: Instead of thinking about "assent" to

³⁸ There is, in the case of duress, an interesting counter proposition: "[C]onsent to a contract resulting from duress is probably far more real than the typical contractual consent." Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 240 (1942).

³⁹ Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 604 (1943).

⁴⁰ Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 242-243 (1942).

⁴¹ At this point, market equations break down. Thus, Hale's thesis that the consequences of not dealing must be worse than the price exacted, or the deal will not be made, is partially false. See Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923).

⁴² As Slawson has pointed out, even those few cases which seem to afford relief for economic duress have as their implicit assumption some illegitimate coercion beyond mere inequalities in bargaining ability. See for example, *Thompson Crane & Trucking Co. v. Eyman*, 123 Cal. App. 2d 904, 267 P. 2d 1043 (1954). The case is discussed in Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 551-552 (1971).

⁴³ Even for duress, the relief has been limited to restoring the excess over what is reasonably and justly due. This restoration of unjustified gain is also the limit in the few instances where the courts have gone so far as to apply the notion of duress to grossly disparate bargaining power. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 282-290 (1947).

boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.⁴⁴

One difficulty with Llewellyn's proposal is that it polices the process by examining the substantive fairness of the deal, and by so doing undercuts some of the essentials of traditional freedom of contract. It can be argued that one should be free to make an improvident or even unfair bargain; substantive regulation denies this. What is therefore needed is regulation of the contracting *process*, to assure that manifest assent and assent-in-fact coincide in as many cases as possible; and that assent, once given, is not only voluntary, but "real" in the sense that the agreement includes actual comprehension of the level of exchange. If the reality of assent to the written form can be substantially guaranteed, only some ideal of a higher value than freedom of contract should be permitted to undercut private economic obligations.

The purpose of the following pages is to analyze how well or poorly the law is able to effect such a guarantee, given its postulation of the bargain hypothesis.

1. Effect of the Signed Form

Thus far we have spoken of manifest assent in the abstract. In standard form deals, it is more specific—a signature to a document purporting to embody (and usually to "fully integrate") the agreement of the parties.

A signature affixed to such a document normally operates as an acceptance of its terms. The actual intent of the signer, so far as it differs from the meaning of the document, will not later be allowed to contradict or vary the writing. The Parol Evidence Rule, for example, assumes that the writing is the "best evidence" of the agreement reached, and operates to make the standard form paramount, at the possible expense of disap-

⁴⁴ K. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960).

pointing one party's expectations in the transaction.⁴⁵ The courts, again viewing the transaction as a bargain-type exchange, view the rule thus:

The purpose of the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence were admissible. . . .⁴⁶

The Commerce of this vast country could not be carried on if written contracts . . . could be breached at will without any resulting liability.⁴⁷

One may not vary the contract's terms by parol, but one *may* demonstrate, that the contract was defectively formed.⁴⁸ But the application of this interpretation, which is the most common, prevents parol modification of precisely the type of case in question: when the inferior party did "assent" to something, but very likely not to the esoteric legal jargon contained in the paper he was told to sign or leave. When the document defines the legal relations between the parties, the terms may not normally be undone by parol evidence to the effect that one of the parties never had exactly those relations in mind.

That this should be the case seems inconsistent with the view that the purpose of signing a written document is to *evidence* agreement to its

⁴⁵ *Masterson v. Sine*, 65 Cal. Rptr. 545, 548, 436 P. 2d 561, 564 (1968) (Opinion by Traynor, Ch. J.). The "best evidence" theory is of mature vintage: BROWNE, A TREATISE ON THE ADMISSIBILITY OF PAROL EVIDENCE IN RESPECT TO WRITTEN INSTRUMENTS 1ff (1893). See also on the rule's structure, BURKE, PAROL EVIDENCE RULE (Undated manuscript in the Pamphlet Collection of the Yale Law School Library.) A recent treatment is Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968). I should hasten to add at this point that the Rule's *basic thrust* is reasonable and necessary; it is not easily to be discarded, if at all. In fact, its continued operation may be necessary to effect the certainty element in contractual affairs, once it has been established that a contract (defined as assent-in-fact) has been created. The function of commenting upon the Rule here is to demonstrate that this is one device which prevents the *present* legal scheme from achieving the object laid out for it in theory. See for example, *Santos v. Mid-Continent Refrigerator Co.*, 9 U.C.C. REP. SERV. 587, 469 S.W. 2d 24 (Tex. 1971).

⁴⁶ *Jones v. Guilford Mortgage Co.*, 120 S.W. 2d 1081, 1083 (Tex. Civ. App. 1938).

⁴⁷ *G. L. Webster Co. v. Trinidad Bean and Elevator Co.*, 92 F. 2d 177, 179 (4th Cir. 1937).

⁴⁸ Sweet, *supra* note 45, at 1039. Lucke, *Contracts in Writing*, 40 AUSTR. L. J. 265 (1966). Assaults on the written citadel can be successfully made by attacking the writing itself, i.e. by alleging that the parties (or either of them) did not intend the paper to be the final agreement. This is of no aid to the present case—we can easily postulate that the parties *did* intend the particular sheet of paper to be their final and complete agreement; what is of concern here is that there was never voluntary consent to those terms *ab initio*, regardless of how faithfully they represent the "agreed to" terms.

Essentially, the parole evidence rule applies to evidence of terms in contradiction to those in the writing. It has, however, no function in preventing the admission of evidence going to the issue of formation of contract, or the validity of contract prerequisites such as assent. And because the approach here is to attack the disparity between the document and the understanding by showing lack of assent, any more detailed discussion of the rule at this point would be technically irrelevant.

terms.⁴⁹ Yet by operation of law, the signature is transformed from evidence of assent to the operative act of acceptance of the writing's provisions.⁵⁰ With the parol evidence rule in mind, this process is by a presumption: absent fraud or mistake⁵¹ "the rule of the common law [is] that a party who enters into a contract in writing . . . is *conclusively presumed to understand* and assent to its terms and legal effect. . . ."⁵²

The inconsistency lies in this: the legitimate purpose of the parol evidence rule is to protect fully integrated documents;⁵³ a document is fully integrated if it contains the whole agreement of the parties on the matter; hence, the agreement must have at some instant existed apart from the document, which thereafter serves to evidence an agreement otherwise reached. But note, the Parol Evidence rule and the presumption create a structure the net effect of which is to make evidence of a thing into the thing itself. The source of this confusion may be that a signature is, in appropriate circumstances, the operative or "performative" act of acceptance. But strictly speaking, the signature—although affixed to a writing—is acceptance of an agreement *not necessarily* contained within the writing!⁵⁴ No harm is caused if the terms of the performer's under-

⁴⁹ Title and Trust Co. v. Nelson, 157 Ore. 585, 592, 71 P. 2d 1081, 1084 (1937).

⁵⁰ RESTATEMENT OF CONTRACTS §70 (1932). (Acceptance of a *written* offer . . .)

⁵¹ Discussed *infra*, next following subsection.

⁵² Zdancewicz v. Burlington County Traction Co., 77 N.J.L. 10, 13, 71 A. 123, 124 (1908) (Emphasis added). To the same effect, Wade v. Park View, 25 N.J.S. 433, 440, 96 A. 2d 450, 453 aff'd. 27 N.J.S. 469, 99 A. 2d 589 (1953); Wangrow v. City of New York, 41 N.Y.S. 2d 814, 815 (1943); Rice v. Dwight Manufacturing Co., 56 Mass. 80, 87 (1848).

⁵³ Sweet, *supra* note 45, at 1036.

⁵⁴ Thus the writing, rather than act as "best evidence," becomes a "performative utterance" in itself. A "performative" is a statement which has no truth content of its own, i.e. it does not describe an event or thing, but is rather the operative act which brings the thing into existence. FOGELIN, EVIDENCE AND MEANING 40 (1967); S. TOULMIN, THE USES OF ARGUMENT, 48 (1958). A statement which reports the thing done is *not* the performative, or operative, act of doing it. See generally J. AUSTIN, PHILOSOPHICAL PAPERS 222 (1961). This is the distinction the law fails to make: the act of signing a given document is an operative act under appropriate circumstances; but because the document is intended to *report* the act thus generated, it cannot itself become the genesis of the obligation. The document, in Austin's terms, suffers from an "infelicity." Compare H. PRICHARD, MORAL OBLIGATIONS 179 (1949).

A similar analysis has been offered by Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L. J. 881, 906-907. Broude's argument is that U.C.C. §2-202 bars parol evidence only when the writing constitutes a "bargain in fact," and that that term requires actual knowledge of the contents of the writing. To the extent that it would require detailed oral explanation by one party to the next, such an argument is in a practical sense unworkable. Broude himself, perhaps, recognizes this difficulty, and restricts his discussion to those cases where an oral statement contradicting the writing has been made. *Id.* at 882-883. Such factual circumstances, one could suspect, occur far less regularly than do those in which no such excessive "puffing" is present. Even when such "puffing" does in fact occur, the result can still be complete excision of the inconsistent oral statements. A recent, and signally clear, example is Santos v. Mid-Continent Refrigerator Co., 9 U.C.C. REP. SERV. 587, 469 S.W. 2d 24 (Tex. 1971).

standing and those of the document are identical; but absent procedural regulation of the "contracting" process, the likelihood of a divergence between these two can be high. And when such a disparity does exist, the law often fails to recognize it; it treats the operative act of acceptance of an agreement as the act of agreeing to something quite different, to wit, the "evidence" of the agreement.

Given that contractual relations are ideally consensual, and further, that the written form is the most adequate method yet devised to provide commercially reliable evidence of promised advantage, it would seem that there would be no conflict between these two concerns if in fact the evidence could be guaranteed to be an accurate representation of the real agreement.

* * *

Through this process the law has subordinated the actual intent and expectations of the signing party to those expressed in the writing which he has signed.⁵⁵ The extent of the liability or obligation assumed⁵⁶ by the signer ceases then to be an act of voluntary willing, and becomes such as a court should thereafter determine.⁵⁷

The rationale for this choice has been variously stated. As Wigmore observed:

The result, however, that is thus brought into outward being does not always correspond with the inward intent; and the problem thus arises . . . *how far either the expression or the intent shall be treated as legally paramount* the one over the other. . . . Juristic speculation of the metaphysical sort tended in modern times at first to regard the intent as vital. But in truth neither can be exclusively the standard; it is a question of adjusting the due relation between the two; and this is the trend of the last century in law and juristic thought.⁵⁸

Wigmore goes on to imply that the problem is one of deciding upon whom the onus created by this disparity should be placed. His again implicit suggestion is that loss follows "fault," *i.e.*, he who is negligent must bear the loss of his expectation, rather than his counterpart.⁵⁹ The decisional

⁵⁵ See for example, *Sturtevant v. Sturtevant*, 146 Conn. 644,, 153 A. 2d 828, 831 (1959).

⁵⁶ For example, *W. T. Rawleigh Co. v. Snider*, 207 Ind. 686, 690, 194 N.E. 356, 358 (1935): "The written contract must be treated as embodying all of the agreements of the parties, and one who signs such a contract is bound to know the extent of his liability thereunder. . . ."

⁵⁷ *Rice v. Dwight Manufacturing Co.*, 56 Mass. at 86; *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190, 196, 61 N.E. 2d 147, 151 (1945).

⁵⁸ 9 J. WIGMORE, WIGMORE ON EVIDENCE §2413 (3rd ed. 1940).

⁵⁹ An example of this reasoning in much abbreviated form is *Vargas v. Esquire*, 166 F. 2d 651, 654 (7th Cir. 1948).

law has been in agreement:⁶⁰ a party is prevented—or estopped⁶¹—from avoiding an obligation not intended but “negligently agreed to.” Administrative convenience and commercial certainty⁶² are the intended beneficiaries of this theory.

Except in a few of those cases in which fraud had been alleged,⁶³ the reported decisions do not lay out an explicit standard of fault versus reasonable care that causes this disposition of the “loss.” Analogy to the rules of negligence in tort law recommends itself.⁶⁴ In general, the standard of behavior when used to determine the situs of loss has three variables: the probability of the loss, its probable magnitude, and the expense of adequate precaution.⁶⁵ A party is considered to have been not at fault with respect to an act or omission if the burden of avoiding the risk was greater than the conceptual product of the loss times the risk of its occurrence.⁶⁶ In the case postulated wherein a party signs a writing the exact legal consequences of whose terms he does not fully understand, the “risk” is equal to the disparity between his actual intent and the objective meaning of the document. The burden of adequate precaution, however, is impractical to bear. He may undertake this burden in either of two ways: first by educating himself in the law; second by seeking competent interpretive advice. In mass-form transactions neither approach is viable. Time bars the first; expense, the second. Further, the other party to the contract would presumably be unwilling to interpret the document’s legal significance for several reasons, including: the expense of doing so; his own inability to appreciate its precise contents; and fear of laying the groundwork for a successful defense of fraud.

⁶⁰ For example, *Langer v. Stegerwald Lumber Co.*, 262 Wis. 383, 56 N.W. 2d 512 (1953). *Cf. Pimpinello v. Swift and Co.*, 253 N.Y. 159, 170 N.E. 530, *aff’d* 236 N.Y.S. 877 (1930). 1 S. WILLISTON, *LAW OF CONTRACTS*, §§95, 95A (Rev. ed., Williston and Thompson 1936).

⁶¹ The classic treatment is EWART, *ESTOPPEL* 25 (1900).

⁶² *Miller v. Lord*, 28 Mass. 11, 23 (1831); *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875):
It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.

The court goes on to note, that allowing a defense of failure to comprehend the legal significance of the contract terms “would render the administration of justice next to impossible.” *Id.* at 51. See also 17 AM. JUR. 2d *Contracts* §149 at 498 (1964):

To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.

⁶³ See *infra*, next following subsection, and note 67.

⁶⁴ In cases of fraud and mistake, the analogy becomes clearer, *viz.* contributory negligence, or fault of the opposite party.

⁶⁵ From the algebra of Learned Hand: *Conway v. O’Brien*, 111 F. 2d 611, 612 (2d Cir. 1940), *rev’d* on other grounds, 312 U.S. 492; *United States v. Carrol Towing Co.*, 159 F. 2d 169, 173 (2d Cir. 1947).

⁶⁶ No units of measurement are intended; this statement is merely a shorthand method of stating the three factors of relevance and their relation to each other.

In short, the burden of acting so as to eliminate the risk of loss is of a magnitude quite out of proportion to both the risks and nature of the mass-market transaction. By drawing upon the great wealth of learning in the field of negligence as a loss-shifting device generally, it seems that the "negligence" of a party who reads but unavoidably fails to understand what he reads is hardly fault at all; it may merely be the inevitable result of his lay status. Having "loss" follow "fault" seems perfectly sensible except when—as here—the "fault" is not that of the consumer, but of the transaction procedure.⁶⁷

The legal effect of adopting a written form is a part of the mechanism by which the objective theory of contract is implemented; or conversely, the result of embracing that view. Whichever, the theoretical inconsistencies just discussed are at the root of the "category" of manifest assent, and hence are partial causes of the law's inability to deal with standard form contracts in a realistic way.

2. Fraud in Acceptance by Signature

It has been noted in another context that "[f]raud vitiates all transactions into which it enters; free consent is an indispensable element of every transaction. There is no real or free consent when it is obtained by fraud."⁶⁸ This seeming prophylactic, however, is but selectively applied:

That "the law affords to everyone reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence or folly or a careless indifference to the ordinary and accessible means of information . . ." is a timeless truth. . . .⁶⁹

⁶⁷ Two recent cases do hint at this "burden" approach: *Local Financing Co. v. Charlton*, 289 S.W. 2d 157, 163 (Mo. 1956); *Rasmussen v. Freehling*, 159 Col. 414, 412 P. 2d 217, 219 (1966). See also the discussion of fault as a loss-placement criterion generally, *supra*.

⁶⁸ *Turner v. Turner*, 167 Cal. App. 2d 636, 640, 334 P. 2d 1011, 1014 (1959).

⁶⁹ 2 KENT'S COMM. 485, as quoted in *Local Finance Co. v. Charlton*, 289 S.W. 2d 157, 163 (Mo. 1956). Compare also Curran, *Legislative Controls as a Response to Consumer-Credit Problems* 8 B.C. IND. AND COM. L. REV. 409, 436 (1967):

The community has an interest in insuring that any process of exchange between private persons conforms to a generally accepted notion of what a private exchange should be, and that it meets community-imposed standards of fairness and decency. A fair and decent exchange does not imply an even exchange; as a rule, no inquiry is made into the relative value of the obligations undertaken and the benefits derived by the participants. Furthermore, a differential in bargaining capabilities of private persons transacting business is acceptable to the community. The community does not, however, tolerate such a differential where the factors creating it are such that the exchange is not, and cannot under any circumstances, be considered to be the outcome of a bargaining process. For example, infants and mental defectives are considered to be incompetent to engage in a bargaining process. Similarly, the community does not approve an exchange in which one party has willfully misrepresented material information on which the other party has reasonably relied. The characteristics which make a person incompetent to bargain, and the kinds of representations that affect the validity of the exchange, are questions for the community to decide on the basis of its own notions of the nature of a decent and fair exchange.

It is the ritual application of this "timeless truth" which often bars the defense of fraud in the form-contract situation.

The elements of fraud are: (1) a false representation (2) of a material fact (3) made with knowledge of its falsity (4) with intent to deceive, and (5) action is taken in reliance upon the representation.⁷⁰ In short, fraud is misrepresentation plus scienter, inducing reliance by the defrauded party.⁷¹

In the present model transaction there will normally be no affirmative misrepresentation. Although it is clear that silence can serve as such, it does so only when there is a duty to speak. In the ordinary sale of consumer goods and services no such duty arises, at least when the consumer appears to be one of ordinary intellect⁷² (absent any confidential relationship).⁷³ The one who offers the form for the other's signature has no obligation to interpret its terms in such a case; rather, the "signer" bears the duty of having it read or explained to him, or is estopped by his own negligence in failing to do so.⁷⁴

Even an intentionally false reading of the document is sometimes held not to be a valid defense of fraud for one in possession of his faculties and able to read.⁷⁵ (One court has justified this by pointing out

⁷⁰ Pence v. United States, 316 U.S. 332, 338 (1942), quoted in Johnson v. Mansfield Hardwood Lumber Co., 159 F. Supp. 104, 117-18 (W.D. La. 1958).

⁷¹ RESTATEMENT OF CONTRACTS §471 (1932). Cf. §§71(c), 475, 476(1), and 479. On the issue of materiality, see Homelite v. Trywilk Realty Co., 272 F. 2d 688, 691 (4th Cir. 1959).

⁷² This is particularly the case when the contract is in writing. See text *infra*. Nor does a party have the duty to explain the contract's legal significance, e.g., United Carbon Co. v. Monroe, 92 F. Supp. 460, 471 (W.D. La. 1950). Even the protection-by-disclosure theory assumes that the writing will not be embellished with oral explanations. See "Truth in Lending," Regulation Z, 12 C.F.R. §226.6 (1969), pursuant to the CONSUMER CREDIT PROTECTION ACT, Pub. L. No. 90-321, 82 Stat. 146.

A duty to speak may arise when one party knows of the other's ignorance of a material fact of which that other is not, nor should be aware. See, e.g., J. A. Jones Constr. Co. v. United States, 390 F. 2d 886, 890-91 (U.S. Ct. of Cl. 1968); Obde v. Schlemeyer, 353 P. 2d 672, 674-5 (Wash. 1960).

⁷³ "The rule (*i.e.* the confidential relation rule) should not be used merely to relieve the indiscreet man from his indiscretions, or the wastrel from his extravagances, or the fool from the consequences of his folly." Van Emmerik v. Mons, 249 Ia. 1299, 1304, 90 N.W. 2d 433, 436 (1958).

⁷⁴ Sutton v. Crane, 101 So. 2d 823, 825-826 (Fla. 1958). Saylor v. Handley Motor Co., 169 A. 2d 683, 685 (D.C. 1961). Negligence has been held to bar the defense even though there had been palpable fraud: City Bank Farmers Trust Co. v. B. W. Constr. Corp., 19 Misc. 2d 593, 594, 196 N.Y.S. 2d 842, 843 (Sup. 1941); including a case where the party read a contract that was not the one to be signed, Hannah v. Butts, 222 Mo. App. 1098, 1106, 14 S.W. 2d 31, 37 (1929).

⁷⁵ Apolito v. Johnson, 3 Ariz. App. 358, 359, 414 P. 2d 442, 443 (1966); Outcault Advertising Co. v. Waurika Nat'l Bank, 100 Okla. 99, 102, 227 P. 144, 146 (1924). Cf. Alexander v. Anderson, 207 S.W. 205, 207 (Texas 1918). (The court makes note of the fact that the signer had not alleged that he could not understand the document, but it does not indicate of what significance such an allegation would have been).

that to rule otherwise would be to violate the parol evidence rule!⁷⁶). In short, the law too often assumes that one capable of reading is either not defrauded by oral misstatement, or is so negligent as to cast the risk of loss upon himself. Reliance, it is said, is not justified when the party has an opportunity to ascertain the terms of the document for himself.⁷⁷ The defense of fraud is thus usually available only when, by trick or device, the signer has been dissuaded or prevented from reading the contract.⁷⁸

Thus stated, the category of fraud is generally of no avail in the most common situation: when a party of ordinary ability is requested to sign a writing, the language of which creates often esoteric legal duties he is not able to fully appreciate. The answer that he refrain from entering into such a transaction will bar him from the great majority of consumer hard-goods and service purchases. The alternative, procuring legal advice on an ad hoc basis, has a similar effect.

There is a line of cases whose approach does represent a personalization of these rules.⁷⁹ Perhaps the best example is *McCarthy v. Cahill*,⁸⁰ in which District Judge Sirica was asked to rule on a motion for new trial or judgment N.O.V. In denying the motion, and sustaining the jury's finding of fraud as a defense, he appeared to be breaking new ground.

The plaintiff's action sounded in tort, he having been injured as the result of a fall in the defendant's home. At trial the defendant attempted to bar the action by producing a release signed by the plaintiff at the

⁷⁶ *Apolito v. Johnson*, 3 Ariz. App. at 359, 414 P. 2d at 443.

⁷⁷ One case has been found which states (*in dicta*) that such a rule applies once the party has undertaken to ascertain its contents. *Alexander v. Anderson*, 207 S.W. at 207.

⁷⁸ *E.g.*, *Avery Co. v. Powell*, 174 Mo. App. 628, 633, 161 S.W. 335, 337 (1913). This seems to be the sole occasion under Georgia law: *Martin v. Alford*, 102 S.E. 2d 598, 601 (1958); *Wynn v. First Nat'l Bank*, 167 S.E. 513, 515 (1933); *Bradley v. Swift & Co.*, 93 S.E. 2d 364, 373-374 (1956).

⁷⁹ These are the insurance release cases, collected at 21 A.L.R. 2d 266, *Release—Misrepresentation of Law*. The cited cases, however, confirm the notion that, as a general rule, something more than misrepresentation and scienter is needed to avoid a contract: an induced confidence or reliance, representation of superior knowledge, domination of the will short of duress, and the like, such as to make the party's reliance on the fraudulent statement "reasonable" under the circumstances.

The annotation is in harmony with the rule of the RESTATEMENT OF TORTS §542 (1938):

The recipient in a business transaction of the maker's opinion upon facts known to the recipient is not justified in relying thereon in a transaction with the maker unless the opinion is material and the maker

- (a) holds himself out as having special knowledge of the matter which the recipient does not have, or
- (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
- (c) has successfully endeavored to secure the confidence of the recipient, or
- (d) knows that the recipient will rely on his opinion.

(Note the affirmative nature of these acts; silence is not listed with the other exceptions.)

⁸⁰ 249 F. Supp. 194 (D.C. 1966).

instance of the defendant's insurer, the real party in interest. Plaintiff alleged and attempted to prove that his signature to the release had been fraudulently procured, and should not evidence his assent to the agreement. Because the plaintiff admittedly had not read the release, the court's interpretation of the law bears even more strongly on the issue: "[w]hile it is the policy of the law to protect the dignity of contracts, there is equally as strong a policy to protect the gullible from sharp practices and not to allow a wrongdoer to profit from his wrong."⁸¹ It would be anomalous, the court noted, to allow the wrongdoer to say that his word ought not to have been believed. Citing Restatement, Torts §540,⁸² Judge Sirica held that whether the plaintiff's reliance on the agent's fraud was negligent—so as to bar the defense—was a question of reasonableness requiring consideration of several factors, including the expense, difficulty, or *expertise* needed to judge the agent's misrepresentations. Had he stopped writing at that point, the judge would have individualized the criteria sufficiently to have them provide some assurance that actual assent would not be ignored. But in the opinion, great care was taken to spell out facts sufficient to create a confidential relationship.⁸³ Furthermore, and even taking the evidence in the light most favorable to the plaintiff, the court upheld the jury's finding, but noted that it would not itself have so found.

For these reasons, and because of the procedural posture of the case, *McCarthy v. Cahill* stands only on the threshold of a new approach to form contracts.

3. Mistake and the Written Contract

Because regulation of the procedural aspects of mass-market transactions has not progressed to the point of guaranteeing assent-in-fact to form contract "bargains," the legal notion of mistake becomes relevant. "Mistake" refers to a state of mind not in accord with the facts.⁸⁴ Such a phenomenon may be said to have occurred whenever the consumer is later "surprised" to learn the full legal consequences of his contract—e.g., when he discovers that his "shoddy goods" defense is not available against the purchaser of his obligation, originally made with another party; or that his two days' delay in performance accelerates the remainder of his obligation, or some other like event.

⁸¹ *Id.* at 198.

⁸² RESTATEMENT OF TORTS §540 (1938): "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." See §540 Comments *a* and *b*; compare §541 Comment *a*, implying a rule of capacity-in-fact to the law of tortious deceit. The risk to a seller of goods in any oral representations can be great. See, e.g., U.C.C. §§2-608 (1)(b); 2-313(1); and *cf.* 2-314(3).

⁸³ *McCarthy v. Cahill*, 249 F. Supp. at 199.

⁸⁴ RESTATEMENT OF CONTRACTS §500 (1932).

In this sense then, the consumer has entered into a contract tainted with "mistake"; he did not—nor could he have been expected to—fully appreciate the intricacies of commercial law as triggered by the express terms of his contract.⁸⁵ Because assent to a thing is impossible by definition if that thing's nature or very existence is unknown, it follows that the presence of "mistaken assent" should vitiate the obligations of the jural act. Once again, one party or the other will have his contractual expectation frustrated, accordingly as this notion is put into effect. As will be shown immediately below, the law has chosen to place the loss upon the party as "fault," defined for this purpose at the one whose expectation differs from an objective interpretation of the terms of the document. To reiterate an earlier suggestion, this notion of fault is arbitrary and unresponsive to the realities of mass-market contracts.

The misunderstanding described above, often referred to as unilateral mistake, is presently accorded juridical importance on but rare occasions, and almost never when standing as the sole defense.⁸⁶ Although it is said that error in comprehending the nature of the transaction renders the obligation void,⁸⁷ that "nature" has not been extended so far as to mean scope of the obligation created. Thus, if one signs a deed, thinking it to be a mortgage, the differences in the "natures" of the transactions (divestment of title to property in the one case but not the other) are sufficient to allow the unilateral mistake to vitiate the deal.⁸⁸ Such misunderstandings are normally mistakes in assessing the character of the instrument. However, once the point is passed whereat the document's character is known, "[m]ere mistake as to (its) legal effect . . . does not vitiate the instrument or afford ground for reformation."⁸⁹ The dividing point is not entirely logical. It seems to be rather the law's own categorical method of analysis imposed upon sets of facts not otherwise rationally so categorized.

This rarely applicable exception of "nature of the instrument" aside, unilateral mistake in a *signed writing* is an inoperative fact, the signature

⁸⁵ This Stoljar would call "expectation-mistake," viz. the party does not deny the existence of the contract, but denies that it expresses his own understanding of his obligations. The other is "correspondence-mistake," wherein the writing is allegedly not reflective of a previously expressed agreement. Stoljar, *A New Approach to Mistake in Contract*, 28 MODERN L. REV. 265, 266 (1965).

⁸⁶ See, e.g., *Meier v. Brooks*, 22 App. Div. 2d 56, 60, 253 N.Y.S. 2d 564, 568 (Sup. Ct. 1964) (*In dicta*): "[O]ne who accepts a written instrument clear in its terms cannot be heard to say that he misunderstood its plain language."

⁸⁷ The so-called error *in negotio*. *Williams v. Robinson*, 98 So. 2d 844, 845 (La. 1957); *Gantell v. Friedman*, 197 N.Y.S. 2d 605, 607 (Sup. Ct. 1959).

⁸⁸ *Williams v. Robinson*, 98 So. 2d at 845.

⁸⁹ *Clampitt v. Ponder*, 91 F. Supp. 535, 543 (W.D. Ark. 1950). (Mistake of law, as opposed to mistake of fact).

as manifest assent having preeminence over unexpressed understanding.⁹⁰ The relationship between the legal effect of a signature and the law of mistake has been expressed thus:

If by negligence one voluntarily remains ignorant of a fact materially affecting his interest and subsequently loses a right or property, he should not expect a court of equity to do that for him which he refused to do for himself. . . . [T]he law attaches to a signature [to a deed in this particular case] much importance and regards it as evidence of the assent to the terms of that contract. That signature remains as an exact photograph of the act and intent of the signer until and unless it is overcome by evidence . . . clear, unequivocal, and decisive as to the *mistake*. . . . [Such evidence must show that the mistake was] mutual, or a mistake of the complaining party and fraud of the opposite party. (Emphasis added).⁹¹

A unilateral mistake, then, ordinarily does not disrupt the contract's legal effect.⁹² A typical case, despite its vintage, is *Lamson v. Horton-Holdon Hotel Co.*,⁹³ an action in equity to set aside a lease on the grounds that the "minds of the parties had never met on the terms." The petitioner had alleged that had he understood the terms of the contract to be as the respondent maintained, he would not have executed the lease at all. Pointing out that the only item of dispute was a misunderstanding of the obligations expressed in the document, the court held that the parties, by signing a writing, had conclusively assented to be bound by its terms in the manner construed by the court. "Neither can avoid this result by saying . . . 'I did not understand the legal effect of this stipulation.' . . ."⁹⁴

The result is that the party whose expectation is in harmony with the court's interpretation of the instrument—and in most cases that will be the proffesor of the form—will prevail over he who entered the contract "by mistake," at least when the contract is not ambiguous by judicial stand-

⁹⁰ RESTATEMENT OF CONTRACTS §70 (1932):

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

Cf. §71.

⁹¹ *McCulloch v. Kirby*, 204 Ga. 738, 51 S.E. 2d 812, 816 (1949). Note also that the case of written contracts has been very nearly excised from the law relative to "Effect of Misunderstanding." Not only do the examples of the Restatement not cover such a case, but the new RESTATEMENT (SECOND) OF CONTRACTS §21A, Comment c at 97-8 (Tent. Draft No. 1, 1964) provides that when there is an unambiguous (by legal standards) contract in writing, the parties are bound subject only to interpretations.

⁹² RESTATEMENT OF CONTRACTS §§573 and 573 Comment a (1932).

⁹³ 193 Iowa 355, 185 N.W. 472 (1921). The case is commented on in 1 CORBIN, CONTRACTS 464n.

⁹⁴ 193 Iowa at, 185 N.W. at 475.

ards.⁹⁵ "If the meaning that either [of the parties] gave to the contract was the only reasonable one under the existing circumstances, the other party is bound by that meaning, and there is a contract accordingly."⁹⁶

The rule that mere failure of comprehension of the terms of a contract knowingly entered into does not affect its obligatory character is supported by the rationale that to allow otherwise would affect adversely the stability of the institution of contract.⁹⁷ If the "expectation-mistake" of misapprehending what a bargain meant were recognized, the fear is that:

... [I]t would introduce an automatic excuse enabling a person to terminate a contract whenever he disliked it . . . [operative mistakes must be limited to those] objectively provable, for unless so provable the allegation of mistake quite apart from facilitating perjury, would give superior rights to one instead of equal rights to both parties.⁹⁸

The law seems here not to recognize that certainty of contract is a double-edged sword; each of the parties has expectations upon which he must rely for the sound ordering of his financial affairs. In those cases, therefore, in which these reasonable expectations differ, one party or the other must bear the "loss." Again having the bargain hypothesis in mind, the law presumes that in those cases in which the loss results from the misunderstanding of one party or the other, there will have been an element of "fault" in the conduct of one or both of the parties.⁹⁹ And the loss should follow the fault, it is said.

An illustration of this loss placement appears in the Comments to both the Restatement of Contracts¹⁰⁰ and the draft version of Restatement (Second) of Contracts,¹⁰¹ as well as in their respective texts. In the former, the understanding of a party of the words of the other is material

⁹⁵ *Kovacheff v. Langhart*, 147 Colo. 339, 363 P. 2d 702 (1961): (When the contract can be construed without extrinsic evidence). *Shackelford v. Latchum*, 52 F. Supp. 205, 206 (D. Del. 1943): "... [O]ne who has signed a written contract . . . will not be permitted to avoid his obligation on the theory that he failed to understand the plain and unambiguous language of the agreement."

⁹⁶ A. CORBIN, *CONTRACTS* §104, 154 (One Volume ed. 1952).

⁹⁷ *Shell Oil Co. v. Boyer*, 234 Ore. 270, 276, 381 P. 2d 494, 498 (1963).

⁹⁸ *Stoljar*, *supra* note 85, at 275.

⁹⁹ When neither was at "fault," but there was yet a vital misunderstanding, the rule is that there is no contract. *See* RESTATEMENT OF CONTRACTS §71 Comments (1932) discussed below. As to the notion of fault as the basis for the law of mistake, *see, e.g.,* Ferson, *Fraud and Mistake in Contracts*, 25 U. CIN. L. REV. 296, 303 (1956):

When parties purpose to make a bargain but, owing to a mistake, their respective assents do not complement each other, no bargain results if: (a) neither party is at fault for the mistake or, (b) both parties are at fault for the mistake. (Emphasis added).

¹⁰⁰ RESTATEMENT OF CONTRACTS §71 (1932).

¹⁰¹ RESTATEMENT (SECOND) OF CONTRACTS §21A (Tent. Draft No. 1, 1964).

in only three cases: (a) if the words are ambiguous;¹⁰² (b) if both parties know of a latent ambiguity; (c) if either party knows that the other's understanding is different from his own. In these cases the party in error will not be made to bear the loss of having unintended obligations extracted from him, because his adversary was equally at fault. The draft of the later text is to the same effect.¹⁰³

In this respect, the law does look to the quality of the opposite party's conduct when considering remedies for unilateral mistake.¹⁰⁴ If the second party knew that the first party at the time of execution of the contract misapprehended its meaning, then the first party is not bound by the writing's terms.¹⁰⁵ In such a case the mistake prevents the existence of a contract.¹⁰⁶ And, although the point is still subject to some dispute, with clear and convincing evidence¹⁰⁷ that the second party knew what his opposite number's intent was, there is a contract in accordance with the

¹⁰² No case has been found to have held that unambiguous means ordinary or plain. That is, the word "cognovit," for example, may be entirely unintelligible to the layman, but it is unlikely to be called ambiguous. Cases in which a cognovit clause is not given its intended effect do not cite its incomprehensibility, but rather its manner of presentation, *i.e.* disclosure, and its effect. *See, e.g.*, *Cutler Corp. v. Tatshaw*, 97 A. 2d 234, 236-237 (Pa. 1953).

¹⁰³ *See* especially §21A(2) *a* and *b* (Tent. Draft No. 1, 1964). Note also Comment *d: d. Mistake in expression*. The basic principle governing material misunderstanding is stated in subsection (1): "no contract is formed if neither party is at *fault* or if both parties are equally at *fault*." Subsection (2) deals with cases where both parties are not equally at *fault*. If one party knows the other's meaning and manifests assent intending to insist on a different meaning, he may be guilty of fraud. Whether or not there is such fraud as would give the other party a power of avoidance, there is a contract under subsection (2)(a), and the mere *negligence* of the other party is immaterial. *See* §491 as to reformation of a written contract in such a case. Under subsection (2)(b) a party may be bound by a merely *negligent* manifestation of assent, if the other party is not *negligent*. The question whether such a contract is voidable for mistake is dealt with in Chapter 17. (Emphasis added).

¹⁰⁴ *See generally*, G. PALMER, *MISTAKE AND UNJUST ENRICHMENT* (1962), especially at 83f. *Cf.* 2 POMEROY, *EQUITY JURISPRUDENCE* §843, as quoted in *Lamson v. Horton-Holden Hotel Co.*, 193 Iowa at 362, 185 N.W. at 475.

¹⁰⁵ RESTATEMENT OF CONTRACTS §71 *c*, and §71 Comment *a* (1932).

¹⁰⁶ RESTATEMENT OF CONTRACTS §501; 17 AM. JUR. 2d *Contracts* §§146-148, at 492-3, 496. *See also* note 108 *infra*.

¹⁰⁷ RESTATEMENT OF CONTRACTS §511 (1932): a mere preponderance of the evidence is insufficient. For this reason alone—although there are more—one might question the utility of such a rule.

first party's expectation; the written document may be so reformed.¹⁰⁸

A close examination of these working rules reveals that they are of no significant aid in the case of adhesive standard form contracts; mistake in assessing the legal relations created by the document is an undisclosed understanding of the consumer, not ordinarily known to the form's proffesor. Hence, the loss is placed on the consumer. The reason for this risk placement lies in the law's notion that the consumer was at "fault" in not securing for himself adequate comprehension of an esoteric writing drafted by the proffesor's firm of legal experts. Even assuming that "fault" as an abstraction is a rational risk placement device,¹⁰⁹ one might question whether its use in these types of transactions is at all sensible.

When one speaks of "fault," the mental impression is usually one of behavior not in conformity with some socially desirable standard, and—more importantly—of behavior which *could have been prevented*. To say then that failure to appreciate the precise consequences of a very complicated (or even simple, in many cases) piece of legal writing is a "fault," is to say that it was avoidable without unacceptable expense. The presumption that every man knows the law may be administratively necessary in other fields, but in the case of standard form contracts at the mass-market level it is entirely unrealistic; to say that he for whom the presumption does not hold true is at fault for not living up to it, is nonsensical.

Little of this has been incorporated into the law of mistake, and so it remains: if *A* and *B* each understand a document's meaning differently, and if *A*'s idea conforms to the unambiguous terms of the writing as objectively viewed, then *A* may enforce the contract according to those terms, no matter that *B*'s reaction may be utter surprise.

¹⁰⁸ RESTATEMENT OF CONTRACTS §505 (1932). This is now said to be the rule: RESTATEMENT (SECOND) OF CONTRACTS §21A, Illustration No. 5 (Tent. Draft No. 1, 1964).

The converse can also be true; see RESTATEMENT (SECOND) OF CONTRACTS §237(3) (Tent. Draft No. 5, 1970): "Where the other party has reason to know that the party manifesting such assent believes or assumes that the writing does not contain a particular term, the term is not part of the agreement." See *infra*, notes 72 and 102, and cases there cited. It is a neat issue as to whether a consumer can fail to expect the existence of a widely used, though creditor-oriented term; this is to say nothing of his showing that the merchant *knew* that the consumer was unaware of its existence. Note especially in this proposed section the continuing refusal to consider comprehension. *Id.* §237(2). Cf. also, *Dayford v. Century Ins. Co.*, 106 N.H. 242, 209 A. 2d 716 (1965).

¹⁰⁹ The notion is presently under attack elsewhere, most notably in the area of automobile negligence. See, e.g., Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?* 33 LAW & CONTEMP. PROB. 429 (1968). The whole problem of costs and resource allocation is crucial to the present inquiry as well. It might be well to keep in mind, however, that "[i]t is precisely the province of good government to make guesses as to what laws are likely to be worth their costs." Calabresi, *Transaction Costs, Resource Allocation, and Liability Risks—A Comment*, 11 J. L. & ECON. 67, 70 (1968).

B. Capacity and Undue Influence

These two remedial categories are similar to those already examined, in that their purpose is to uncover defects in the validity of contractual assent presumed by the adoption of a signed written form. Once again, it is argued, the defect referred to does exist, but in the greatest majority of cases the corrective device is prevented from curing the transaction. More specifically, consumer form contracts as they are now written escape inquiry in all cases of "normal" mass-bargain.¹¹⁰

1. Capacity to Contract

The maxim *ignorantia juris non excusant*¹¹¹ notwithstanding, one of the two central problems raised by mass-market contracts is that an individual is nearly always incapable of assessing with even a modicum of certainty the legal rights and duties generated by the often complex jargon of the document he has signed. In short, he lacks the *capacity* to understand the entire range of consequences of his agreement.

Such a misunderstanding of the legal effect of an instrument is often classified as mistake of law,¹¹² which—if the opposite party's conduct is insufficient to create the defense of overreaching—normally will not provide a basis for either affirmative or defensive relief.¹¹³ The presumption that a party is capable of understanding the nature and effect of his contracts,¹¹⁴ rebuttable only by a showing of legally operative incompetence, is once again grounded in the policy of protecting the expectation interest of the party whose intention best conforms to the court's interpretation; viz., the objective theory:

To adopt a subjective test for mutual assent opens the door to perjury. How can we ascertain a party's subjective mental state? Very often only by permitting him to say what it is or was. Under such circumstances the element of self-interest looms large. Another practical difficulty inherent in the use of the subjective test is that it would leave the promisee in the uncertain position of being unable to rely on what appears to be the plain provisions of a promise made to him.¹¹⁵

¹¹⁰ See, however, *infra* pp. 31-35, as to unconscionable agreements and judicial techniques of amelioration.

¹¹¹ Corbin's unconvincing defense of this aphorism as applied to contractual misunderstanding is at §616, at 570 (One Volume ed. 1952).

¹¹² 3 A. CORBIN, CONTRACTS §619.

¹¹³ *Clark v. Trammel*, 208 Ark. 450, 186 S.W. 2d 668 (1945) (Citing POMEROY, EQUITY JURISPRUDENCE). See also RESTATEMENT (SECOND) OF CONTRACTS §21A (Tent. Draft No. 1, 1964). The Restatement position represents the most liberal view, and one not entirely in accord with the decisional law.

¹¹⁴ *Olsen v. Hawkins*, 90 Idaho 28, 33, 408 P. 2d 462, 464 (1965).

¹¹⁵ Phelps, *The Nature of Mutual Assent in Contracts*, 10 OKLA. L. REV. 410, 411 (1957).

Again, Phelps's argument is unconvincing; it will almost by definition be the profferor whose intention is expressed by the written terms, and thus he who is benefitted by the objective approach. Protecting one "class" of parties to a transaction to the detriment of the "opposing" class¹¹⁶ is not adequately explained by asking, in effect, which party had readier access to expert legal counsel and draftsmen.¹¹⁷

That "mistake of law" is generally to no avail would be an excusable phenomenon if the doctrine of capacity were applicable. The difference between the two is that in the former the mistaken party is at "fault" for his error, while in the latter there is no such accusation. The operative facts necessary to eliminate the supposed negligence are not entirely clear;¹¹⁸ what is clear, however, is that a normal lack of commercial expertise is not presently considered sufficient *diminution* of capacity to erase the stigma of "fault" from the unavoidable risk of mistake of law.

This is, again, not to say that "fault" is an unusable criterion of loss placement; to the contrary it is perhaps potentially the most rational.¹¹⁹ Rather, what is argued is that whatever criterion is chosen, it must be in accord with its own factual determinants. Once assent-in-fact is guaranteed, then the decision to frustrate one or the other of two divergent expectations can quite properly be determined by whatever political view of resource allocation one chooses to accept. But, given the present definition of contractual "assent", the notion of *fault* makes sense only if it is factually responsive. This is not the case with the present line of demarcation between incompetence and mistake. This point is most clearly demonstrated by the illiteracy cases: "The general rule is that, in the absence

¹¹⁶ The tension between the policies favoring one "class" over the other is the basis of the rules of contractual capacity. See generally LINDMANN & MACINTYRE, *THE MENTALLY DISABLED AND THE LAW* (1961). The balance is merely struck at the wrong point.

¹¹⁷ Insurance cases often involve this issue of access, although there the burden is placed on the profferor whenever a court finds (or imagines) an ambiguity. "Handicapped by the axiom that courts can only interpret but cannot make contracts for the parties, courts had to rely heavily on their prerogative of interpretation to protect a policy holder." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943). As Professor Kessler points out, such a technique is not always available. It has, I feel, additional disadvantages. One such is that it sacrifices one party's interest to that of another without fair warning; it is in effect a retroactive substantive regulation. Although one's sense of justice in the case may be satisfied, this result is a radical one. See, e.g., *Gray v. Zurich Life Ins. Co.*, 54 Cal. Rptr. 104, 419 P.2d 168 (1966).

¹¹⁸ *Waggoner v. Atkins*, 204 Ark. 264, 271, 162 S.W. 2d 55, 58 (1942):

Perhaps no branch of jurisprudence is more tenuous or spectral than that dealing with one's mental capacity to contract. Law books are replete with comments by text—and opinion—writers who have sought, figuratively, to ascertain where the strip of herbage lies "that just divides the desert from the sown"; yet all too often have their labors been in vain.

¹¹⁹ It is here that the analogy to tort law may break down. There is less room in the philosophy of commercial enterprise for loss-shifting criteria such as wealth distribution than in the law of torts.

of fraud, one who signs a written agreement is bound by its terms *whether he read and understood it or not*, or whether he *can* read or not."¹²⁰

The degree of incompetence needed to defeat a contractual obligation is the lack of sufficient reason to understand the nature and effect of the act in issue.¹²¹ The phraseology of this definition is unfortunate, for the hope it raises, it rapidly disappoints. Far from realizing that average intelligence does not make *non ignorantia juris* into truth rather than fiction, the rule is stated to mean that not even that level, *i.e.*, "average" intelligence is necessary to a valid and inescapable "agreement."¹²² Failure to appreciate the nature and effect of the document must, therefore, be not failure to appreciate its entire legal significance in the sense of the totality of obligations it raises, but rather the inability to appreciate the character of the jural act.¹²³

Diminished capacity is, however, given some recognition even when falling short of the incompetency standard:

Mental weakness, although not to the extent of incapacity . . . may render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of these, or even with unfairness such as great inadequacy of consideration, may make a contract voidable when neither such weakness nor any of these other things alone . . . would do so.¹²⁴

This represents a shift in focus to the conduct of the opposite party

¹²⁰ *Cohen v. Santojanni*, 330 Mass. 187, 192, 112 N.E. 267, 271 (1953) (Emphasis added). The defendant was unable to read either English or Italian. In *Sutherland v. Sutherland*, 187 Kan. 599, 358 P. 2d 776 (1961), a woman with a verified I.Q. of not over 67 had been characterized by her own counsel as an "ignorant moron." *Id.* at 781. The court nevertheless refused to grant relief, noting at 785:

A contracting party is under a duty to learn the contents of a written contract before signing it, and if without being a victim of fraud he fails to read the contract or otherwise to learn its contents, he signs the same at his peril and is estopped to deny his obligations thereunder. . . .

But see discussion of unconscionability *infra* p. 32.

¹²¹ Note, *Mental Incompetence as It Affects Wills and Contracts*, 13 U. FLA. L. REV. 381, 383-385 (1960); Weihofen, *Mental Incompetence to Contract or Convey*, 39 U. SO. CALIF. L. REV. 211, 216 (1966). Compare RESTATEMENT (SECOND) OF CONTRACTS §18 c and Comment b (Tent. Draft No. 1, 1964): "... the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made." (Note how far this text misses the mark when the contract is not only adhesive but also made with a quasi-monopolistic promisee.) See also §18(2)(c), and compare §21A. The rationale of §18c is set forth in Comment a; its defect is as argued above.

¹²² *Cundick v. Broadbent*, 383 F. 2d 157, 160 (10th Cir. 1967); see also *Sorik v. Conlon*, 91 R.I. 439, 443, 164 A. 2d 696, 698 (1960). (Mere mental weakness or inferiority of intellect are not bad enough.)

¹²³ Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176, 180-183 (1943).

¹²⁴ *Petree v. Petree*, 211 Ark. 654, 657, 201 S.W. 2d 1009, 1010 (1947).

to the transaction, and is a well established device to protect against overreaching.¹²⁵

The standard for incompetence alone is more stringent than that for incompetence coupled with objectionable behavior.¹²⁶ According to one authority, this conglomerate approach, when applied in practice, ceases to follow the theory of any of the individual doctrines,¹²⁷ and becomes instead an unarticulated policing of the deal.¹²⁸ In effect, it is similar to the requisites of substantive unconscionability.¹²⁹

In another place, fraud, undue influence and incompetency are referred to as a case of "legal isomerism."¹³⁰ Unfortunately, each of the isomers must be present before the desired reaction will occur; one of them, undue influence, is an element not sufficiently common in form contract transactions to achieve with a satisfactory degree of reliability a consistent guarantee of *voluntary* obligation.

¹²⁵ E.g., *Connors v. Eble*, 269 S.W. 2d 716, 717-718 (Ky. 1954); *Cundick v. Broadbent*, 383 F. 2d at 166, final paragraph. (Dissent by Hill, C. J.); 2 JAEGER, WILLISTON ON CONTRACTS §256, 96-97 (3d ed. 1959). The vigilante provision of the proposed U.C.C.C. (Working Draft No. 8, 1968), allowing injunctive relief against sharp trade practices, urges the court to consider, *inter alia*, "[T]he fact that the respondent has knowingly taken advantage of the inability of the debtor reasonable [sic] to protect his interests by reason of...inability to understand the language of the agreement...." U.C.C.C. §6.111(3)(E). It may be that in drafting this section the commissioners had in mind the facts of *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (1966), reversed on the question of damages, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (Sup. Ct., Ap. Term 1967). (In *Frostifresh*, a buyer who spoke only Spanish signed a retail installment contract written in English, having been "distracted and deluded" by the Spanish-speaking seller.) That is, is the word "language" in this section to mean foreign language? The Comments give no indication. Observe what would happen if "language" were interpreted to mean prolix or complex English or Legaleese. Then the very result sought by this paper's proposal would have been effected, through the alternative of a redefinition of "ambiguity" as a word of art. The remedy of §6.111 is a public one, and the effect on any given contract could be left in doubt. Presumably, however, mercantile counsel would protect its clients by redrafting their forms.

Such an interpretation is not entirely unlikely if the history of the U.C.C.'s disclaimer of warranty provision is indicative of judicial responses to new techniques. U.C.C. §2-316(2) requires certain disclaimers to be "conspicuous," as defined in §1-201(10). In two recent cases there have been dicta to the effect that following the literal sense of §1-201 is insufficient if the writing is otherwise not constructed so as to call close attention to the disclaimer. *Hunt v. Perkins Machinery Co.*, 352 Mass. 535,, 226 N.E. 2d 228, 232 (1967). The disclaimer must be so clear as to leave "no doubt as to the intent of the contracting parties." *Boeing Airplane Co. v. O'Malley*, 329 F. 2d 585, 593 (8th Cir. 1964), 17 A.L.R. 3d 1010, 1078-1079 (1968).
¹²⁶ *Cundick v. Broadbent*, 383 F. 2d at 160.

¹²⁷ I.e., fraud, duress, undue influence, incompetence, and mistake.

¹²⁸ Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

¹²⁹ See discussion in text *infra* p. 33.

¹³⁰ Green *supra* note 123, at 302. A similar comparison of two other "categories" appears in Note, *Duress and Undue Influence—A Comparative Analysis*, 22 BAYLOR L. REV. 572 (1970).

2. Undue Influence

Undue influence involves the use of excessive pressure applied by a dominant subject to a subservient object, with the result that the will of the servient person is subjugated to that of the dominant.¹³¹ Contract procuring behavior amounting to mere advice, argument or persuasion does not constitute undue influence if the individual acts "freely" when executing the questioned documents, although he might not have done so absent such advice or persuasion.¹³² As one court has pointed out: "[t]he difference between legitimate persuasion and excessive pressure, like the difference between seduction and rape, rests to a considerable extent in the manner in which the parties go about their business."¹³³

The ultimate question in each case is whether the servient party was a free and voluntary agent, exercising free and deliberate judgment.¹³⁴ Once it is shown that the will has been overcome, the unreality of manifested assent is recognized, and the consent may be rescinded.¹³⁵ Stated thus, it seems quite unlikely that such objectionable behavior would occur in a normal mass market transaction; they are normally not sufficiently personalized that one party may be said to have gained "dominance" over the will of his opposite.¹³⁶

However, the issue is worth raising for this reason: if the allegedly prevailed-upon party can establish that he was in a confidential relationship (*i.e.*, trustee-*cestui*, attorney-client) with the other, undue influence will be *presumed*.¹³⁷ The effect of this presumption is to shift to the "superior" party the burden of proving either one of two things: that the transaction made was substantively "fair," or that the bargain process was procedurally unobjectionable, *i.e.*, it was the free will of the party to assent to the terms of the deal. A typical "confidential relation" involves some form of association prior to the questioned act giving one party or

¹³¹ *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 128, 132, 54 Cal. Rptr. 533, 540 (1966). See also, Note, *Duress and Undue Influence—A Comparative Analysis*, *supra* note 130, at 573f.

¹³² *People v. Catholic Home Bureau*, 34 Ill. 2d 84, 93, 213 N.E. 2d 507, 511 (1966).

¹³³ *Odorizzi*, 246 Cal. App. 2d at 134, 54 Cal. Rptr. at 542.

¹³⁴ ARENSEN, *THE DOCTRINE OF UNDUE INFLUENCE IN ANGLO-AMERICAN LAW* 2 (1953).

¹³⁵ *Odorizzi*, 54 Cal. Rptr. at 541. The court also implies that the case for undue influence will normally require a showing of unusual, or abnormal, bargaining conditions. *Id.* at 541.

¹³⁶ Arenson, *supra* note 134, at 4-5. Note also the personal nature of the conditions giving rise to undue influence as noted in 5 WILLISTON, *CONTRACTS* §1625A (Rev. Ed. 1936), and in the listing of typical undue influence patterns in *Odorizzi*, *supra* note 131, at 541. These sorts of dramatic situations—while they do appear often enough to be significant—do not occur with great frequency in typical form-contract deals. Were undue influence expanded enough to cover the more typical patterns of contract-procuring behavior, it would by definition need to consider all contracting non-merchants as "presumptive sillies." See Leff, *infra* note 139.

¹³⁷ ARENSEN, *supra* note 134, at 33 *et. seq.*

the other the opportunity to take unfair advantage of his counterpart.¹³⁸ Again, it has been noted in a slightly different context that "dramatic situations" similar to these are exceedingly rare in a contract of sale.¹³⁹ That this is true will not presently be disputed; it seems, however, that the objection does not conclude the issue.

If the notion of confidential relationship raises the burden-shifting presumption because one party is in a position to sway the will of another, it might not be too whimsical to extend the scope of the relationship to include proffesor and profferee in an adhesive standard form deal, wherein the seller, for example, by offering to deal on his own terms or not at all, has at least guided the will of the buyer into accepting the least harmful of two unpalatable choices. Further, his quasi-monopolistic position may even have created an expectation of fair dealing in the unwary consumer; this unintentional raising of a confidence or reliance is the extreme of the doctrine in question, but is not entirely unwarranted.

Or stated another way, if the theory of undue influence is to correct defects in the bargaining procedure, and further if the indications for its use are some kind of discrepancy between the abilities of the respective parties in intellect or commercial experience, why is it necessary to require an additional qualification, namely that a confidential relationship be demonstrated before the burden of proof will be shifted? As has been seen, the burden is initially upon he who seeks in court to have his expectation satisfied—it is shifted to the defendant by the operative act of his signing a document. Seen in this light, it perhaps does not seem too radical to suggest that the "superior" party continue with the burden which originally is his when by his quasi-monopolistic bargaining position he has been able to require that very signature as a pre-condition to his entertaining the "bargain" at all! The overreaching nature occurs when the document is so drawn as to preclude the possibility of full appreciation by the profferee; it is the context of the dealing itself which creates in him the reasonable expectation of fairness and his justified reliance in the proffesor that "unfair advantage" will not be taken of his inferior capacity to understand the totality of legal relations so carefully thought out beforehand by the author of the form.

C. Juridical Responses

Recent juridical trends evidence an awareness of the unreliability of these more traditional methods of ameliorating defective manifestations of assent. There is in these newer developments, however, a shift in focus.

¹³⁸ The RESTATEMENT OF CONTRACTS §497 seems to define the relation as one in which the first party's acts permit the second party to justifiably assume that the first party will not act in a manner inconsistent with his (*i.e.* the second party's) welfare.

¹³⁹ *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 533 (1967).

While courts applying the rules of fraud, duress, and incompetency have been policing the bargaining process, recent devices go more directly to the issue of equality of exchange by attempting to police the substantive provisions of the deal.

1. Construing the Contract

Conscious of the exigencies of parties who participate in the private law-making process from a relatively weak bargaining position, a large number of courts have seen fit to implement judicially noticed standards of substantive fairness. These same courts, however, were equally conscious of the fundamental axioms of freedom of contract. The resolution was obvious. By seizing upon their prerogative of interpreting "ambiguous" contract language (as opposed to rewriting the contract for the parties), many substantively oppressive terms—often ambiguous only in the mind of the court failing to reach a just result—were denied enforcement, by being construed to say something other than what they had been carefully drafted to say. Kessler's classic analysis of the insurance cases illustrates the process brilliantly. His conclusion is instructive:

[C]ourts have made great efforts to protect the weaker contracting party and still keep "the elementary rules" of the law of contracts intact. As a result, our common law of standardized contracts is highly contradictory and confusing. . . . Society had thus to pay a high price in terms of uncertainty for the luxury of an apparent homogeneity in the law of contracts.¹⁴⁰

That the techniques of construction and interpretation are doomed to ultimate failure is a conclusion agreed on by Llewellyn as well:

First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the *minimum necessities* are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.¹⁴¹

¹⁴⁰ Kessler, *Contracts of Adhesion—Some Thoughts on Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943).

¹⁴¹ Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939).

One might also question the utility of an ad hoc (hence, unpredictable) policing technique which occurs primarily at the appellate level. It seems too obvious for documentation to note that the terms of a contract in the overwhelming majority of cases are never passed on by a court. The threat of litigation, however, being the threat of governmental enforcement of the contract's terms, is a coercive tool. Adherence to the terms is not usually obtained by levy. Such pressures cannot be eliminated by an uncertain appellate court procedure. Only when the judicial reaction becomes systematic and certain is there any hope of affecting the relative "threat levels" of the disputing parties.

2. Unconscionability

It was perhaps Karl Llewellyn's distaste for covert tools which led to the statutory encapsulation of the doctrine of unconscionability.¹⁴² In theory at least, overt substantive policing of contract terms is more acceptable than the fancy judicial footwork employed in interpretation and manipulation of the language of the contract.¹⁴³ But if Leff was correct in stating that the word "unconscionable" is so utterly vacuous and void of reality referents that U.C.C. §2-302 ultimately "says nothing with words,"¹⁴⁴ then all that has been accomplished by the use of unconscionability is the lifting of the restraint of embarrassed illogic from courts who previously might have engaged in the process of "intentional misconstruc-

¹⁴² U.C.C. §2-302. *Unconscionable Contract or Clause.*

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Although Article 2 of the U.C.C., of which §2-302 is a part, applies by its terms only to "transaction in goods," U.C.C. §2-102, the unconscionability concept has been employed in other circumstances; see for example, *In re Dorset Steel Equip. Co.*, 2 U.C.C. REP. SER. 1016 (E.D. Pa. 1965), and *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966)—both cases involved financing contracts, and in both the doctrine was at least considered to be applicable.

¹⁴³ U.C.C. §2-302, Comment 1:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to the public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.

¹⁴⁴ Leff, *supra* note 139, at 559.

tion." Or more pessimistically, real-world effects could even be retarded.¹⁴⁵

This doctrine has been discussed, analyzed, supported, and refuted in the literature with as much frequency (and, often, as much passion) as nearly any other single issue.¹⁴⁶ To review such an enormous collection of opinions is somewhat beyond the scope of the present purposes; it is, however, helpful in assessing the utility of the doctrine to refer to the statutory text itself, and some cases which have considered it.

While it is yet unclear what *procedural* niceties or contract-procuring behaviors will insulate a contract or clause from *substantive* attack, it seems obvious so far that typical retail trade practices will not always be seen as nasty enough to undo the obligations.¹⁴⁷ Furthermore, the statute permits the party whose form is under attack to defend himself by presenting evidence as to the clause's "commercial setting, purpose and effect."¹⁴⁸ If taken seriously, as statutes often are, then such a showing must in some cases be sufficient to save the clause *despite* the existence of bargaining nastiness bad enough to establish the buyer's *prima facie* defense.¹⁴⁹ That being the case, there are three points worth noting.

First, the final decision on the question of conscionability is one for the judge, not the jury.¹⁵⁰ Hence the evidence—both justifying and damning—is not only a function of the vagaries of the litigation process, but is

¹⁴⁵ *Id.* at 558-559. One of the better responses to Leff's criticism is that by Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969). Ellinghaus' argument includes essentially two points. First, he asserts that there are in fact reality referents sufficient to the task; second, that the "task" of unconscionability is to serve as a "residual category," very much like "reasonableness" and "good faith." By definition then, no structural (hence predictable?) framework should be attempted, at risk of destroying the very flexibility intended.

¹⁴⁶ Leff, *supra* note 139, and Ellinghaus, *supra* note 145 begin the list. Other than the INDEX to LEGAL PERIODICALS, the following volumes contain lists of articles worth sampling: 1 U.L.A.-U.C.C. (Master Edition) 139-140, and Supplement 25 (1971); M. EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY (1966, 1967, and 1969 editions).

¹⁴⁷ Business mores, it seems, may be less relevant than judicial mores. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 455 (D.C. Cir. 1965); and the view of that case taken by R. SPEIDEL, R. SUMMERS and J. WHITE, *COMMERCIAL TRANSACTIONS*, 249-251 (1969). In *Williams*, an ADC mother purchased several items of furniture from the seller, each time subjecting the items to an "add-on" security interest. Buyer eventually defaulted, seller attempted to repossess, the lower court allowed the seller's actions, and finally Circuit Judge J. Skelly Wright remanded for trial on the issue of unconscionability. As a result, it is entirely unclear how large a role disclosure of the terms of the contract played in the decision. Judge Wright's list of relevant factors included: equalities in bargaining power; relative levels of education; deceptive sales practices; fine print terms; knowledge of the terms of the contract; and, ultimately, the commercial "reasonableness" of the bargain. *Williams v. Walker-Thomas*, *supra* at 449. That some level of "procedural conscionability" *can* avoid an inquiry into "substantive conscionability" is implicit in the opinion. *Id.* at 449. But cf. *American Home Improvement Corp. v. MacIver*, *infra*, note 152.

¹⁴⁸ U.C.C. §2-302(2).

¹⁴⁹ See Leff's discussion, *supra* note 139, at 541-546.

¹⁵⁰ U.C.C. §2-302, and §2-302 Comment 3.

submitted to a decision-maker whose knowledge of community expectations vis-a-vis commercial practices will be entirely a hit-or-miss affair.

The second point is equally telling: if evidence of "commercial setting, purpose and effect" is relevant, what sorts of things could save the clause for the merchant (assuming that the consumer can guess and prove what might be unconscionable in his contract to begin with)? Or conversely, the contract or some part of it might be struck down if (a) some less onerous alternative clause would have yielded the same entrepreneurial profit, or (b) the resulting incremental profit was excessive, or (c) the term is unenforceable as a matter of policy despite its business setting. The burden of proof for the buyer in situation (a), to say nothing of the administrative burden, seems prohibitive in the greatest run of cases. Case (b) is at least as troublesome—instituting profit maxima seems unlikely in the political climate of this century.¹⁵¹ The profit margins attributable to the entropies of even noncompetitive markets are not currently seen as pernicious, absent of course some actual trade-restraining collusion.¹⁵² Alternative (c) amounts to substantive regulation of particular mercantile devices, and is not really a function of contract at all.¹⁵³

A third point is that U.C.C. §2-302(2) seems less than adequately concerned with real contractual assent. If the bargaining process was defective, so as to call the contract terms into question, then it can be safely

¹⁵¹ This article was written prior to President Nixon's unexpected use of economic regulators in Phase II. Such emergency regulation, even to the limited extent that it does impair profit maximization, has nothing at all to do with the problems discussed in this paper.

¹⁵² The unconscionability cases are themselves sometimes in agreement on the excessive profit issue:

Defendant's argument in the motion for summary judgment contends that the selling price was "more than twice the amount" that the items purchased cost the plaintiff, thereby reinforcing a defense of unconscionability by combining a mark-up argument with that of a usurious loan. Having disposed of the latter, it remains to be indicated that as to mark-up, no limits have been set by legislation on merchant latitude in choosing the prices at which they sell their goods. It is a fact of common knowledge that mark-up on furniture frequently exceeds 100%. In this respect the terms of the contract in issue have not been shown to be "so extreme as to appear unconscionable according to the mores and business practices of the time and place."

1 CORBIN, *Contracts* §128 (1963). *Capital Furniture and Appliance Co. v. Morris*, 8 U.C.C. REP. SER. 321, 322 (D.C. 1970). Yet there have been cases indicating that excessive price may by itself be an unconscionable item: *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, ..., 298 N.Y.S. 2d 264, 266 (1969); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 439, 201 A. 2d 886, 888-889 (1964); and cases cited at *Jones*, *supra* at ..., 298 N.Y.S. at 266. The conflict among the reported cases could be the result of the lack of any ascertainable referents in the statute, or—and significantly, I think—the real impossibility of setting out the level of reasonable profit.

¹⁵³ U.C.C. §2-318 ("Third Party Beneficiaries of Warranties Express or Implied"), for example, contains the flat prohibition: "A seller may not exclude or limit the operation of this section." (cf. Alternatives A, B and C of §2-318, in the 1966 amendments to the U.C.C.) Compare those clauses (modifications or limitations of remedy) which may be, or are *presumptively*, unconscionable, U.C.C. §2-719. No degree of reality of choice or of assent will traverse the forbidden devices such as U.C.C. §2-318. Such regulation, therefore, is not concerned at all with the *consensual* nature of the exchange.

presumed that true assent had not been obtained.¹⁵⁴ But the validity of the terms can be justified by some showing of business exigency. The net result is that commercial needs *could* justify non-consensual contracts.¹⁵⁵

A critique of the defense of unconscionability could go beyond merely carping at its unpredictability, lack of standards, and partially misdirected scope. After all, Ellinghaus' justification¹⁵⁶ of the concept as a residual category is a substantial jurisprudential point. The further criticism concerns the utility of applying any such "floating" doctrine to a market whose participants very seldom feel the direct presence of The Law.¹⁵⁷ Given the existing inadequacies in consumer access to the courts,¹⁵⁸ a rule of unpredictable application has substantially less than perfect deterrent value. Nothing short of a clear and certain prophylactic will be able to eliminate the *in terroram* contracting and collecting techniques of adhesive contractors, except for that very small number whose claims actually come to trial.¹⁵⁹

3. Alternative Approaches

The difficulty in an adhesive situation is that the party's manifest "assent" is not the ideal act of free and voluntary willing the law of

¹⁵⁴ See *supra* note 147.

¹⁵⁵ Where this leaves adequate disclosure, then, is an interesting question. The U.C.C. does appear to be concerned with it [see U.C.C. §2-302 Comment 1: "The principle is one of prevention of...unfair surprise." note also 2-316(2)], as were the pre-Code [Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960)] and now certain of the Code cases [e.g., *In re State of New York (ITM, INC.)*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303, 3 U.C.C. REP. SER. 775, 794 (1966)]. But the parameters of the disclosure requirements have as yet to be evolved. This is not to indict unconscionability for failing to be born with intricate definitions. Rather, the point is that as it currently stands, the doctrine is not equipped to probe to the heart of the unreality of contractual assent. See text *infra* p. 32.

¹⁵⁶ Ellinghaus, *supra* note 145.

¹⁵⁷ Even those who *do* are not necessarily dissuaded. In *Frostifresh v. Reynoso*, a seller whose form and tactics were held unconscionable was allowed to recover the cost to him of the article sold, the buyer not having tendered it back. 52 Misc. 2d 26, 274 N.Y.S. 2d 757, 760 (1966). On appeal, however, the seller was allowed net cost, "plus a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges." 54 Misc. 2d 119, 281 N.Y.S. 2d 964, 965 (1967). If this be the result of having a deal labelled unconscionable, the seller has little to lose by trying again. In other words, only the litigant buyer is afforded the benefit of U.C.C. §2-302. *Frostifresh*, thankfully, has not set the pace on the issue of damages.

¹⁵⁸ Including access to legal counsel as a practical matter for "small-ticket" items.

¹⁵⁹ CHRISTIANSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS, 3 (American Bar Foundation, 1970):

Even laws and legal institutions that are genuinely responsive to essential problems may nevertheless be irrelevant to these problems if the legal services necessary to make them operative are not readily obtainable by those who might benefit from them.

A similar thesis has been proposed in a different but related context: BRICKMAN, EXPANSION OF THE LAWYERING PROCESS THROUGH A NEW DELIVERY SYSTEM: THE EMERGENCE AND STATUS OF LEGAL PARAPROFESSIONALISM, at 12-13 *et seq* (Ford Foundation Report, 1971).

contract should seek to engender. It is, rather, a decision to accept one of two alternatives, neither of which may be very palatable, but one of which must be taken. In the words of Lord Chancellor Northington, "[N]ecessitous men are not, truly speaking, free men. . . ."¹⁶⁰

The decision to enter into a contract of adhesion is therefore an economic decision that nonparticipation is worse than the price exacted. Numerous responses to this realization have been made. Llewellyn's "severable contract" thesis for example, recognizes the difficulty of speaking of "assent" to form contract deals.¹⁶¹ Of similar effect is Oldfather's proposal, that enforcement of adhesive agreements should be a process of selective judicial review of private lawmaking, using as a standard a hypothetical bargain which did not, in fact, occur.¹⁶² He suggests testing the contract term in question against the hypothetical bargain, to determine whether it would have been agreed to in a non-adhesive bargain. Oldfather, like many others, does recognize the non-bargain analysis; his solution however, is defective because he too has treated adhesive deals as deviants, and attempts to reconcile them to the unrealistic bargain hypothesis. Hence, the end result is one of substantive regulation of the deal; those terms which are unreasonable or unfair are considered to be inoperative.¹⁶³ Assuming that to enforce a contract "... puts the machinery of the law in the service of one party against the other,"¹⁶⁴ this and other such proposals in essence advocate judicial intervention into the arena of "free" enterprise.¹⁶⁵ The State, to be sure, does have an interest in the treatment its citizens receive at their fellows' hands, and one should allow that it has a duty to protect the weaker from the financial rapacity of certain of the stronger. But the method of

¹⁶⁰ *Vernon v. Bethell*, 2 Eden 110, 113, 28 Eng. Rep. 838, 839 (1762).

¹⁶¹ See *supra* note 44.

¹⁶² Oldfather, *Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking*, 16 U. KANS. L. REV. 303 (1968).

¹⁶³ Oldfather's method would require the court to ask whether the given clause was a true cost of the "industry," or was inflated by the industry's quasi-monopoly. To decide contract cases on such grounds is, again, a task hardly fit for the *ad hoc* intervention of judicial tribunals. Basically, the choice of the relevant arena is in error.

¹⁶⁴ Cohen, *The Basis of Contracts*, 46 HARV. L. REV. 553, 562 (1933).

¹⁶⁵ A similar system is that of the *Israeli Standard Contracts Law* (Feb. 12, 1964). Pre-issue approval of a "restrictive term" in a standardized contract can be secured in a proper tribunal. The essential difference here is that consideration of the validity of the term is made in a much broader context than is possible during a private lawsuit. Jacobson, *The Standard Contracts Law of Israel*, 1968, J. BUS. L. 325, 328ff (1968).

A recent article on the American side, Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971), gets closer to the point by suggesting the model of administrative law as indicating the proper perspective for understanding the evolution of contract terms. Slawson's substantive regulation, however, is premised on his view that "it would be unrealistic to try to make the law of contract fair and legitimate by insisting that a standard form, to be enforceable, must be an uncoerced, informed agreement." *Id.* at 532.

obtaining the desired degree of protection is also important; permitting an anti-majoritarian institution to restructure the economic order on an *ad hoc* basis does not seem to be consistent with the limited competencies apparent in the assigned tasks of judicial tribunals.

III. SOME CONCLUSIONS, AND A PROPOSAL

In summary, neither the "residual"¹⁶⁶ nor the more traditional¹⁶⁷ ameliorating categories are sufficient to cover the analytical cracks opened by adhesive standard form contracts. As to the former, their very nature precludes accurate predictions about outcomes. And considering the highly inefficient filtering-down effect of *ad hoc* judicial policing, turning to such things as unconscionability as a cure is as a practical matter a predictably ineffective choice. The traditional categories are similarly suspect at the real-world level. The fictional bargain hypothesis upon which they are predicated leads to such a distorted picture of risk allocation (by location of fault) that only a highly strained and therefore unreliable view of the operative facts could yield much relief in a typical run of cases. And then, of course, the same criticisms that were leveled at the "interpretation" system become relevant.¹⁶⁸

The difficulty is that the typical form-contract transaction at the consumer level just does not fit the law's pre-conceived view of private obligations.¹⁶⁹ Two quite different responses to this realization are possible. One has been to recognize that the real problem is not one of analytical impurity, but simply that from time to time unfair deals are being imposed upon often unwitting participants. The response is to police the substantive contours of the bargain to bring it back within socially acceptable levels of unfairness. Whether this policing agency be legislative, judicial, or administrative might ultimately matter very little, for two reasons. The first is that predictability (which in consumer credit, for example, is hardly a mere shibboleth) is impossible without specificity, and specificity in a regulatory rule is the one single quality which most generously contributes to the ever-increasing sophistication (and often the temporary success) of the commercial draftsman's art. The other is that a practice which may seem excessively protective of one party to the transaction may be a legitimate cost of his doing business with some segments of the

¹⁶⁶ See part II c(1) and (2) *supra*: Unconscionability and contract "interpretation."

¹⁶⁷ Fraud, mistake, duress, *etc.*, parts II, A and B.

¹⁶⁸ *Supra*, text at notes 140ff.

¹⁶⁹ *Supra*, text at note 3f,

market place.¹⁷⁰ Outlawing such a contract term or device without even an inquiry into the issue of its proper setting becomes paternalistic at best—at worst, entry into the market place is precluded for all those with whom the contractor cannot afford to do business on any other basis. Neither would burdening the contractor with the duty of tailor-drafting the agreement for each case be tenable: today the need for standardized transactions is simply too great.

The alternative response is to recognize that the existence of “unfair” bargains results in the form contract setting from two related phenomena: lack of comprehension on the part of one party, combined with little freedom of choice in the matter—both of which are troublesome only when the contract is not reflective of a substantially voluntary agreement. Consumer protection schemes and efforts aimed at particular unfair or oppressive devices are applications of band-aid law to the *symptoms* of a much deeper malaise, rather than real cures.¹⁷¹ But by attempting to devise a system that will guarantee actual assent in the greatest possible number of cases, even in those cases involving the most non-negotiable of form documents, we will have attacked the root of these manifest difficulties. All that need be done is to make the bargain hypothesis real. And to do this requires but the simple step of guaranteeing, so nearly

¹⁷⁰ An excellent example of empirical research on exactly this point is: Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969). A proper place for such legislative regulation has been outlined by McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. AND COM. L. REV. 387, 393 (1967):

From the buyer's point of view, the two chief requirements are *adequacy of information* on which to base a rational choice and *freedom from any coercion* that could force his choice along certain lines. From the point of view of the selling side of the market, fairness requires that there must be no collusion or constraints on the offerings of competing sellers. Because the system is fueled by self-interest, legal proscriptions to prevent forms of monopolistic control, deceit, and misrepresentation are absolutely essential to the proper operation of a market economy. Only then is there a possibility of achieving maximum consumer welfare. For this reason, even the most libertarian economists and political scientists should and do logically accept the principle of some legal control of consumer credit. What matters is that the controls promise to accomplish the objectives italicized above.

¹⁷¹ See Curran, *supra* note 69, at 410:

Inadequacies can be attributed to a general failure to recognize and treat the consumer-credit problem as a total process represented by the consumer-credit market. Instead, each symptom of an underlying malfunctioning or imperfect operation of the market has been treated as an isolated phenomenon, incidentally related to other consumer-market problems and the resultant legislative response, being specialized to the symptom and not related to the underlying cause, has not only failed to deal with the underlying cause, but has been ineffectual in allaying the symptom. Even when it has been recognized that consumer-credit regulation is regulation of some aspect of a larger process, the creation of statutory controls has not reflected this perception. Since problems have not been treated as arising out of the operation of the larger process, legislation has been created without a realistic appraisal, in most instances, of the causes of the problem that the legislation is intended to resolve.

as may be done, that the requisite "bargain"¹⁷² include the now too-often missing elements of *knowledge* and *choice*.

Knowledge, or real comprehension of the consequences of a jural act, can be obtained by *adequate* disclosure. And choice, even in an imperfectly competitive market, can be had by eliminating the lack of knowledge, one of the more insidious of the entropies of monopolies real and artificial.¹⁷³ The call, then, is to redirect our policing methods to examine more rationally the procedural dimensions of the contracting process, since it is bargaining *behavior* which most directly affects the flow of information essential to real assent. Given the parameters of the form contract context—a substantially unalterable written document offered on a take-it-or-leave-it basis—the first focus of inquiry should be the written document; and the object, assuring that it conveys the information requisite to full comprehension in a way that can be understood and compared with other similar offers. Or, more directly, in a manner which causes the impact of the clause, term or contract to be *felt*.¹⁷⁴

The sorts of research efforts now needed to attack the central problem of guaranteeing that "bargains" are indeed consensual acts are, I submit, beyond the pale of many of us in the legal profession,

¹⁷² Text at notes 1 and 2, *supra*.

¹⁷³ Slawson, *supra* note 165, at 548-549, was correct in observing that, ... [C]onsumers do care enough about warranties to make their selections felt competitively if they are sufficiently informed to do so. If courts were to deny effect to warranty disclaimers unless consumers were truly informed of them, manufacturers would have no choice but to engage continuously in the kind of competition over forms which would make them better for consumers. ... Even if only a few consumers out of every hundred used their newly gained understanding of the differences among competing forms as a basis for choice, the effect would be sufficient to force issuers to improve their forms for all. Producers take seriously even small percentage declines in sales. Since forms are standardized, a change intended to benefit the few who discriminated between forms would work to the benefit of all.

As Caplovitz has observed in discussing the captive market, "The local merchants ... (impose) upon their naive customers terms of exchange that are far worse than those they could obtain if they knew where and how to shop." D. CAPLOVITZ, *THE POOR PAY MORE* (1967) 182:

The problem lies not so much in the failure of the legal structure to establish their (*i.e.* the low income consumers') rights as in the failure of these consumers to understand and to exercise their legal rights. The legal structure is based on a model of the "sophisticated" consumer, not that of the "traditional" consumer prevalent among low-income families. It assumes, for example, that the consumer understands the conditions to which he is agreeing when he affixes his signature to an installment contract. But we have seen, time and again, that this assumption does not hold for many of these consumers.

Id. at 188.

¹⁷⁴ "Cognitive dissonance" is a phenomenon not restricted to medical matters. There is a wide gulf separating knowledge from impact; Mrs. Williams may have *known* of Walker-Thomas' "add-on" clause, but it is another matter whether its impact was at the intellectually operative level at the time she signed the contract. This is one possible explanation for the ineffectiveness of loan cost disclosure discovered by White. See White and Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971).

including judges, lawyers, legislators, and law professors. It is a job for the empiricists. And what is more, for empirical researchers with relevant competencies in the social and psychological disciplines.¹⁷⁵ Only through study of this sort can we erect a framework of behavior standards applicable to the contracting process which would attack the root cause of the adhesion-deal dislocations. And we should begin that inquiry with as few predispositions as possible—by forgetting the unproven assumptions of the past. While an inequality of bargaining positions between consumers and purveyors will probably never be avoided for any given individual,¹⁷⁶ a rational merchant disclosure/behavior system would at least provide the basis for comparative shopping. And at the heart of a capitalist or mixed economy is the conviction that at some price there will be a supply for every demand. If a significant number of the consumers in a market are aware of the impact of a given term, for example, and express even quietly the wish that it were not present, then unless the term is a part of the irreducible minimum necessary to yield the entrepreneurial profit, there will be a supplier of the commodity who will offer his wares without the objectionable matter.¹⁷⁷ Hence, the term will continue to exist only if either its legal significance is not adequately felt by those subject to it, or if it cannot profitably be dispensed with. And if the latter is the case, but the former is not, a contractual decision to pay that cost should and must be enforceable.¹⁷⁸

The thesis, in a nutshell, is that legal pupilism alone has proven itself ultimately infertile in solving adhesion contract problems. Disclosure requirements and substantive controls dictated by hunch and indignation are essentially misdirected. By now turning the inquiry to the issues of

¹⁷⁵ The practical futility of relying on such law-professor-drafted devices as "conspicuous" disclaimers has been demonstrated by Woods, *Consumer Expertise and* §2-316 (1970). (Unpublished student paper in the author's files at the University of Toledo.) Even were such devices useful:

... [t]he consumer would still face the problem of the little man and the law—the problem of how to use our legal machinery as an effective sword. Here he meets obstacles that are not created by the use of contractual devices, but are inherent in a law of sales designed neither to encourage little claims nor to protect the contract expectations of non-merchants.

Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 590 (1969). The author has sufficient difficulty describing the content of the phrase "merchantability" to a third-year class in Commercial Law, to dampen any optimism he may have had for protecting buyers by making the word appear in the boldest print in a disclaimer clause. See U.C.C. §2-316(2).

¹⁷⁶ Although it *can* be minimized by increased competition. I agree with White, that "[o]ne desirable act would be to break down the barriers that now exist to market entry by new lenders." White and Munger, *supra* note 174, at 1240. White's conclusion, generally, was that "...at least with regard to auto loans, the disclosure provisions of the Truth-in-Lending Act will be largely ineffective in changing consumer behavior patterns." *Id.* at 1239.

¹⁷⁷ See Slawson's argument, *supra* note 173.

¹⁷⁸ Here too a bit of *empirical* analysis of the commercial need for nasty clauses would be most helpful.

comprehension, perception, and decision-making in a factual way, and by requiring the observance of bargaining patterns dictated by such studies, the essential corruptions identified in mass-market contracts can be eradicated without the need to engage in palliative and potentially dangerous substantive regulation. And some analytical symmetry might then even exist in a modern reality-based law of contracts.

